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Supreme Court of the United States

OCTOBER TERM, 1952

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No. 44

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON AND W. R. McENTIRE, ET AL., PETITIONERS,

vs.

WYCOFF COMPANY, INCORPORATED, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1952

CERTIORARI GRANTED JUNE 9, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 6, 1952.

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and Proceedings Before the Honorable Willis W. Ritter, Judge of the United States District Court for the District of Utah, Presiding in the Following-Entitled Cause:

WYCOFF COMPANY, INCORPORATED, a Corporation, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, Donald Hacking and W. R. McEntire, Defendants,

and

MELVA SEAMONS and ROY HILL, d/b/a SEAMONS TRUCK LINE, and Joseph J. Milne Truck Line, Inc., a Corporation, Intervenors.

Number 1904—Civil

COMPLAINT—Filed October 10, 1950

Plaintiff complaining of the defendants, and each of them, alleges for cause of action:

(1) That the plaintiff is a Utah corporation engaged in the transportation of property for hire by motor vehicles in interstate commerce.

(2) That the defendants, Hal S. Bennett, Donald Hacking, and W. R. McEntire, are all members of the Public Service Commission of Utah.

(3) That plaintiff transports motion picture films and newsreels for various motion picture film exchanges situated in Salt Lake City, Utah, between said exchanges and motion picture exhibitors at points in Utah, Idaho and Montana, in pursuance of a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission under docket Number MC89684 and subs and amendments thereto.

[fol. 2] (4) That the Public Service Commission of Utah issued to plaintiff and "Interstate License," No. 314, under date of August 9, 1949, by which plaintiff is authorized to transport in interstate commerce within the State of Utah motion picture films in pursuance of plaintiff's interstate commerce Certificate No. MC89684 and all subs and amendments thereto. Said Interstate License is still in full force and effect and has not been revoked or cancelled.

(5) That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations.

(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the plaintiff and imposing an undue burden upon interstate commerce.

(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreels in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer irreparable injury unless defendants are enjoined from their threatened action.

(8) That this case arises under the Constitution and the laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate commerce and the exclusive authority to regulate the same.

Wherefore, plaintiff demands judgment against the defendants, and each and all of them, as follows:

(1) That the Court make and enter a declaratory judgment adjudicating that the transportation of motion picture film and newsreels is interstate commerce.

[fol. 3] (2) That the defendants, and each and all of them, be forever enjoined and restrained from interfering with the transportation of motion picture film and newsreels in Utah by plaintiff over the routes as authorized by the Interstate Commerce Commission under docket No. MC89684 and all subs and amendments thereto.

(3) That plaintiff be awarded such other and further relief as may be deemed just and equitable.

(4) That plaintiff be awarded its costs and disbursements herein.

Harry D. Pugsley, Zar E. Hayes, Calvin L. Rampton, Plaintiff's Attorneys, 721 Continental Bank Building, Salt Lake City, Utah.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 3, 1950

Comes now the defendants herein and for answer to plaintiff's complaint herein, allege and state:

Defendants admit the allegations stated in paragraphs one (1), two (2), and three (3) of the complaint except that part of paragraph three (3) alleging that the transportation of motion picture films (except newsreels) between Salt Lake City, Utah, and points in Utah is in pursuance of any Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission, which part is specifically denied.

Defendants admit the allegations of paragraphs four (4) and five (5) of said complaint except the parts of said paragraphs alleging or inferring that the the transportation of motion picture film (except newsreels) by plaintiff between points in and within the State of Utah is interstate in character, or that the Public Service Commission of Utah has by issuance of an "Interstate License" thereby declared that said transportation of motion picture film within the State of Utah or wholly between points in the State of Utah [fol. 4] is in interstate commerce or interstate in character, or that the Interstate Commerce Commission has by any

of its orders or otherwise declared such transportation to be interstate in character, which parts are specifically denied.

Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8) except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied.

Wherefore, defendants pray that the judgment demanded by the plaintiff be denied and that defendants be awarded their costs.

C. W. Ferguson, Attorney for Defendants, 314 State Capitol Building, Salt Lake City, Utah.

Receipt of a copy of the foregoing answer is acknowledged this 1st day of November, 1950.

Harry D. Pugsley, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSION OF FACTS—Filed November 14, 1950

To: C. W. Ferguson, Attorney of Record for Defendants, 314 State Capitol Building, Salt Lake City, Utah:

Please take notice that the plaintiff hereby requests the defendants, and each of them, in pursuance of Rule 36, of the Federal Rules of Civil Procedure, to admit within ten days after service of these requests, for the purpose of the above-entitled action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts.

[fol. 5] 1. That motion picture news-reels have been designated by the Interstate Commerce Commission as being interstate in character.

2. That motion picture news-reels are customarily produced, processed, manufactured and packaged outside of

the State of Utah and shipped from such point or points into the State of Utah for the purpose of being exhibited in theaters in Utah, Idaho, Montana, Wyoming and parts of Nevada and Oregon.

3. That motion picture news-reels are customarily booked under an agreement whereby the theatres in Utah and other states contract in advance to receive and exhibit said news-reels, prior to *its* actual delivery into the State of Utah.

4. That the said news-reels are shipped directly to a branch office distributor of film in Salt Lake City, Utah, and then trans-shipped from that point to the various theatres within the State of Utah, Idaho, Wyoming, Montana, Nevada and Oregon to fulfill the advance booking dates.

5. That it is customary for exhibiting theatres to show not only a news-reel, but also motion picture film designated as a feature, a comedy and often other short features, all of which are distributed by different national film companies having branch offices at Salt Lake City, Utah.

6. That the film distributors all have principal offices in New York and California and maintain branch offices in various localities, one of which is Salt Lake City, Utah, and from said branch offices in Salt Lake City, Utah, they distribute motion picture news-reel, feature, and comedy film throughout all of Utah, Idaho and Nevada and parts of Wyoming, Montana and Oregon. Twelve such typical branch office distributors located at Salt Lake City, Utah, are:

Name	Address
Columbia Pictures Corp.	206 E. 1st South
Eagle Lion Classics	252 E. 1st South
Loew's Incorporated	123 So. 2nd East
Monogram Pictures, Inc.	254 E. 1st South
National Screen Service Corp.	212 E. 1st South
Paramount Film Distributing Corp.	270 E. 1st South
R. K. O. Radio Pictures, Inc.	204 E. 1st South
Republic Pictures Corp.	214 E. 1st South
[fol. 6] Twentieth Century-Fox Film Corp.	216 E. 1st South
United Artists Corporation	210 E. 1st South
Universal Film Exchange, Inc.	208 E. 1st South
Warner Bros. Pictures Distributing Corp.	200 E. 1st South

7. That said news-reels and other motion picture films are frequently shipped from one theatre to another theatre within the State of Utah without returning to the distributor's branch office in Salt Lake City, Utah.

8. That generally in conjunction with said shipments of news-reels within the State of Utah, the exhibiting theatre has accompanying such news-reel, a feature picture film and a comedy film for exhibiting at the same theatre as part of the same show.

9. That said motion picture film feature is customarily booked in advance of its arrival within the State of Utah under contract, whereby the said motion picture film will be exhibited in the various theatres upon receipt at the dates so scheduled, subject to approval of release dates by the New York office.

10. That said motion picture films are produced, processed, manufactured and packaged outside of the State of Utah and are shipped from such point to a branch office distributor within the State of Utah, under contracts with the exhibitor, all of which must be approved by the New York office.

11. That said ordinary motion picture film is customarily wound on metal reels similar in character and appearance to those used for news-reel film and all are shown on the same projectors and by use of the same physical equipment.

12. That, except for the size of the container wherein said reels are deposited for shipping, said feature and comedy motion picture film moves in substantially the same manner, package and appearance as do news-reels.

13. That it is the general custom of the motion picture exhibiting industry in Utah that the showing of a feature motion picture is accompanied by the showing of a news-reel.

14. That the showing of news-reel, a feature and comedy motion picture at a particular theatre in Utah customarily [fol. 7] starts and ends on the same date so that the time of arrival and departure of the news-reel and the other motion picture film to and from said theatre must be concurrent.

15. That it is customary for the carrier of motion picture film to transport news-reels and the feature and com-

edy motion picture reels for a particular theatre in one load and to deliver said film at the theatre and to pick up from the theatre similar packages containing news-reels, feature and comedy motion picture reels and either deliver said news-reel and other motion picture reels to another theatre or return the same to a branch office distributor at Salt Lake City, Utah.

16. That on frequent occasions, the news-reel and other motion picture reels will be booked for showing at places and points outside of the State of Utah following their showing at various theatres within the State of Utah.

17. That all of the film distributors do not sell the news-reels, features or comedy films, but only license the right of exhibition thereof and the film ownership remains in the national distributor and the film itself is returned to New York after all bookings have been fulfilled.

Dated this 13th day of November, 1950.

Harry D. Pugsley, Of Pugsley, Hayes & Rampton.

IN UNITED STATES DISTRICT COURT

REPLY TO REQUEST FOR ADMISSION OF FACTS—Filed November 22, 1950

To: Pugsley, Hayes and Rampton, Attorneys of Record for Plaintiff, Continental Bank Building, Salt Lake City, Utah:

Comes now the defendants herein, by counsel, in compliance with Rule 36 of Federal Rules of Civil Procedure, and files their Reply to Plaintiff's Request for Admission of Facts, as follows:

1. Reference is made to alleged fact No. one (1) on page one (1) of plaintiff's request. If plaintiff intended to state, "That the transportation of motion picture newsreels has [fol. 8] been designated by the Interstate Commerce Commission as being interstate 'in character'," then defendants will admit that the Interstate Commerce Commission has so held where the facts underlying said interstate transportation of news-reels are identical with the facts set forth

in the case decided by the Interstate Commerce Commission, known as Tramways, Inc., vs. Exhibitors Delivery Service, Inc. Otherwise, defendants will deny said No. one (1) alleged fact.

2. Reference is made to Nos. two (2) and three (3) alleged facts, page one (1) of plaintiff's request. They are admitted.

3. Reference is made to No. four (4) alleged fact, pages one (1) and two (2) of plaintiff's request. Defendants do not know, therefore, defendants neither admit nor deny this fact.

4. Reference is made to alleged facts Nos. five (5) and six (6), page two (2) of plaintiff's request. They are admitted.

5. Reference is made to alleged fact No. seven (7), page two (2) and three (3) of plaintiff's request. It is denied.

6. Reference is made to alleged fact No. eight (8), page two (2) of plaintiff's request. Defendants do not know, therefore, neither admit nor deny the alleged fact.

7. Reference is made to alleged fact No. nine (9), pages two (2) and (3) of plaintiff's request. It is denied.

8. Reference is made to alleged fact No. ten (10), page three (3) of plaintiff's request. Defendants admit "that motion picture films are produced, processed and manufactured outside the State of Utah for shipment to Utah." The remainder of the alleged factual statement is denied.

9. Reference is made to alleged facts Nos. eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), pages three (3) and four (4) of plaintiff's request. They are denied.

10. Reference is made to alleged fact No. seventeen (17), page four (4) of plaintiff's request. Defendants admit that film distributors do not sell newsreels, features, nor comedy films—only license the right to exhibit them and that the [fol. 9] ownership remains in the film distributors. Defendants deny remainder of said alleged factual statement.

Dated this 21st day of November, 1950.

C. W. Ferguson, Attorney for Defendants.

[Verification omitted.]

In United States District Court

Partial Transcript of Proceedings on Pretrial—Filed April 5, 1951

Appearances:

Mr. Harry D. Pugsley, Mr. Wayne C. Durham, Attorneys for Plaintiff. Mr. C. W. Ferguson, Attorney for Defendants. Mr. Rex J. Hanson, Attorney for Seamons and Hill. Mr. Wood R. Worsley, Attorney for Joseph J. Milne Truck Lines, Inc.

Colloquy Between Court and Counsel

Mr. Pugsley: I think those are the fundamental issues of law and fact.

There are a number of issues of fact that will probably be questioned.

The Court: *Lets* hear what they are.

Mr. Pugsley: I have listed several I believe that will come up for determination: Are the film contracts between residents of different States?

All these contracts by exhibitors we contend are contracts that are signed by them but approved by the companies in either New York or California, and are contracts relating to this film between residents of different States. I don't know whether they admit that.

Mr. Ferguson: I don't think that is a matter in issue. This is not a question of validity of contract between parties residing in different States. It is a question of the character of the transportation within the State of Utah.

Mr. Worsley: We wouldn't admit it. I am advised that is not the situation.

Mr. Hanson: Neither will we.

[fol. 10] The Court: All right. I wonder if that is going to be material at all.

Mr. Pugsley: We believe so. A number of decisions have come down—whether it is interstate in character—deal with the question of contracting between residents of different States.

The Court: Contracts between whom and whom? If a contract between the carrier and somebody, that is material, but if it is a contract between the motion picture exhibitors

and distributors to which the carrier is not a party, how could that be material?

Mr. Pugsley: Only that the film itself partakes of an interstate character; not necessarily this transportation issue but the film itself is still in the course of interstate movement by virtue of contract entered into between non-residents and residents of Utah.

Mr. Ferguson: I believe the evidence will show in the case the transportation contract itself which is concerned in the case is a transportation contract between the exhibitor living in Utah and the carrier Wycoff. There is a contract with regard to the picture itself which goes to the picture company, but as the contract itself will show it has little to do with the transportation contract, which is a separate matter. The evidence will show the exhibitors themselves state in their contract that the matter of transportation within the State of Utah shall be the responsibility of the local exhibitor and the carrier.

Mr. Durham: We contend the contract will show the distributor has the final say on how the transportation will be accomplished.

The Court: I wonder if that point isn't covered in the first issue I suggested here?

Mr. Ferguson: I think it covers them all.

The Court: Do you disagree?

Mr. Pugsley: No. The factual matters will have to be whipped out on the trial. If we could agree on some of them——

The Court: Try another one.

[fol. 11] Mr. Pugsley: The character of the films is such they are never sold or consumed within Utah but merely leased by non-residents for exhibition within the State.

The Court: Isn't any controversy about that, is there?

Mr. Durham: After they are used they are shipped back for salvage purposes.

Mr. Ferguson: We admit the contract is a licensing contract to show the film in Utah. I would not like to be bound by a statement that the contract is an interstate contract.

The Court: They will admit there is no sale of the films. I think that is the general practice. It is a licensing arrangement.

Mr. Hanson: The films are just the things shown upon them, the object upon them—like a News reel—is the important thing; the things shown on the film.

The Court: What the exhibitor gets is the privilege to *throwing* the shadow on the screen. Do you want to admit that is the nature of the thing?

Mr. Hanson: So far as we are concerned I think so.

The Court: All right.

Mr. Pugsley: The local distributing office in Utah is merely a branch office of the non-resident film company; is used for operating convenience in the State.

The Court: Is there any disagreement about that?

Mr. Ferguson: I do not disagree with it.

The Court: For the Public Service Commission you admit that?

Mr. Ferguson: Yes.

Mr. Hanson: I don't think we do.

The Court: You represent whom?

Mr. Hanson: Seamon Truck Line.

The Court: Do you admit it?

Mr. Worsley: The matter of stating it for the sole convenience—there are branch offices, that we would admit. [fol. 12] The Court: Sole convenience is a conclusion. May we agree that the admission is that the local film distributor's office is a branch office of the producer?

Mr. Ferguson: Yes.

The Court: Is that what you wanted?

Mr. Pugsley: Yes.

The Court: What else?

Mr. Pugsley: That the transportation of motion picture News reels has been designated by the Interstate Commerce Commission as being interstate in character.

Mr. Ferguson: We deny that.

Mr. Hanson: We deny that. May be a difference between News reels and motion picture film as such, the way they are prepared and transported. We deny News Reels as such are shipped—.

Mr. Worsley: In the last stipulation this distribution, according to Mr. Pugsley, was locally made by branches of the producers. I am not so sure that is correct. I think it is made by distributor companies apart from the producing company itself.

The Court: I think that is so. Don't you think so, Mr. Pugsley? Aren't these distributing corporations separate corporations from the producing corporation in the motion picture industry? When they talk about a branch office here, isn't that office a branch of the distributing corporation?

Mr. Pugsley: That is correct.

The Court: Rather than a branch of the producing corporation?

Mr. Pugsley: That is correct.

Mr. Worsley: May the stipulation be made subject to check?

Mr. Ferguson: That is standard.

The Court: It is a branch of the distributing corporation. The distributing corporation is national in scope over these local branch offices.

[fol. 13] Mr. Pugsley: That motion picture News reels and the motion picture film are both produced, processed, manufactured and packaged outside of the State of Utah.

The Court: Sometimes that is not true.

Mr. Worsley: We deny that.

The Court: Some of the motion pictures are made in Utah.

Mr. Pugsley: That is only partially so.

Mr. Durham: They are produced but not distributed. The distribution always takes place in California or New York.

The Court: Your request for admission includes production and distribution too.

Mr. Ferguson: The evidence with regard to the handling of the films themselves, the packaging and the processing for shipment, all of which takes place at Film Row, is going to figure in the decision prominently.

The Court: We cannot admit that I guess.

Mr. Pugsley: The motion picture News Reels and the motion picture film are customarily booked under an agreement whereby the theaters in Utah and other States involved contract in advance to receive and exhibit them prior to the actual delivery into the State of Utah.

Mr. Worsley: We don't admit that.

Mr. Pugsley: And customary for exhibiting theaters to show not only the News Reel but also motion picture film designated as Feature or Comedy or Short Features, all

of which are distributed by different national film companies having branch offices in Salt Lake City, Utah, to show not only News Reel, to show a Feature and something else.

Mr. Ferguson: We agree to that.

Mr. Hanson: We will too.

Mr. Worsley: This proposal goes a little further. They agree the theater will show News Reel, Feature and other Short Features.

The Court: That is all you mean, isn't it?

Mr. Worsley: It goes beyond that. We will stipulate to that extent, yes.

[fol. 14] Mr. Pugsley: That the film distributors have their principal offices outside the State of Utah and maintain branch offices in Salt Lake City, Utah—a branch office here.

The Court: That covers something we have already. Of course the distributing companies operate their principal offices outside the State of Utah. No disagreement about that, is there?

Mr. Pugsley: That the branch office so maintained in Salt Lake distributes the film not only in the State of Utah but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada.

The Court: No disagreement about that?

Mr. Hanson: No.

The Court: That branch office distributes over the intermountain area here?

Mr. Worsley: I am a little handicapped here because of shortness of time. I think that is right; I am not sure it is correct as to all of the listed distributors.

The Court: You don't admit it then. The rest of them do. Go ahead.

Mr. Pugsley: That the News Reels and motion picture film are frequently shipped from one theater to another theater within the State of Utah without returning to the distributor's office in Salt Lake.

Mr. Ferguson: Occasionally, I will agree.

The Court: Have you changed the word to "occasionally?"

Mr. Pugsley: It is more than occasionally.

The Court: Go to the next one.

Mr. Pugsley: That ordinary motion picture film is cus-

tomarily wound on metal reels similar in *charactar* and appearance to those used for news-reel film and all are shown on the same projectors, and by use of the same physical equipment.

The Court: What difference does that make whether—

[fol. 15] Mr. Pugsley: This is our contention: the Interstate Commerce Commission has said that News Reels are interstate in character and an identical commodity, except it is a Feature instead of a News Reel, is film handled in the same manner, must be of the same character.

The Court: It doesn't make any difference to me what the Interstate Commerce Commission has ruled about either one of those things. We are going to determine right here whether either one of them is interstate in character.

Mr. Pugsley: I believe that is important to the assumption of jurisdiction of the Interstate Commerce Commission over the commodity to determine—.

The Court: I am not going to adopt the ruling of the Commerce Commission just because they ruled on it; not even going to take the ruling of the Commission as any evidence. I think it is immaterial what they have ruled. We are going to determine the character right here on the basis of the evidence and the law.

Mr. Pugsley: That the showing of News-reel, a feature and comedy motion pictures at a particular theater in Utah customarily starts and ends on the same date so that the time of arrival and departure of the news-reel and the other motion picture film to and from said theater must be concurrent.

That is 14.

Mr. Worsley: We deny.

Mr. Pugsley: 15. That it is customary for the carrier of motion picture film to transport news-reels and the feature and comedy motion picture reels for a particular theater in one load and to deliver said film at the theater and to pick up from the theater similar packages containing news-reel, feature and comedy motion picture reels and either deliver said news-reel and other motion picture reels to another theatre or return the same to a branch office distributor in Salt Lake.

Mr. Ferguson: Part of that we would admit.

The Court: If you cannot admit it all, go to the next one.

Mr. Pugsley: That on frequent occasions, the news-reel and other motion picture reels will be booked for showing at [fol. 16] places and points outside of the State of Utah immediately following their showing at various theatres within the State of Utah.

Mr. Ferguson: We deny it.

Mr. Pugsley: That all of the film distributors do not sell the news reels, features or comedy films but only license—.

The Court: That is repetition.

Mr. Pugsley: One further item in it. And the film itself is returned to New York after all bookings have been fulfilled.

Mr. Ferguson: That we will deny.

Mr. Pugsley: Those are the factual matters we thought could be admitted.

One further thing; the certificates of public convenience and necessity held by the Wycoff Company are available and copies have been given to counsel. You indicated that wasn't of great concern to you. We tender such as an exhibit.

Mr. Ferguson: No objection.

The Court: Have the reporter mark the exhibit as a pretrial exhibit.

(Exhibit 1 on pretrial marked by the reporter.)

Mr. Worsley: In view of the fact Mr. Pugsley has covered the requests for admission, is there any sense in attempting to answer them now?

The Court: Do you request them to answer your requests for admission?

Mr. Pugsley: No, there is no further need for that in our opinion.

The Court: You decline, Mr. Worsley, to admit some of those matters which the Public Service Commission and other trucklines admitted. Maybe after this session you can get together and find out what information you seek and where other counsel have made the admissions you can too. It would be too bad to go to trial on an issue that you only deny when it is admitted by the others.

Mr. Worsley: I will endeavor to do so.

[fol. 17] Reporter's Certificate (omitted in printing)

IN UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Filed January 22, 1951

This cause coming on for pretrial on the 12th day of January, 1951, Mr. Harry D. Pugsley and Mr. Wayne C. Durham appearing for the plaintiffs, and Mr. C. W. Ferguson appearing for the Public Service Commission of Utah, defendant, and Mr. Rex J. Hanson appearing for intervenors Seamons and Hill, and Mr. Wood R. Worsley appearing for intervenor Joseph J. Milne Truck Line, Inc.

Now therefore, upon the statements of counsel for the respective parties, as to the issues of law and fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

(1) Whether or not as a matter of fact the carriage involved herein is interstate commerce.

(2) The issue of law as to whether the character of the transportation as determined constitutes interstate commerce.

Willis W. Ritter, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 7, 1951

This matter coming on regularly for hearing before the Court, without a jury, on the 30th day of January, 1951, and the plaintiff, Wycoff Company, Incorporated, appearing by its president, M. S. Wycoff and its attorneys, Harry D. Pugsley, of the firm of Pugsley, Hayes and Rampton, and Wayne Durham; and the defendants, Public Service Com- [fol. 18] mission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, members, appearing by their attorney, C. W. Ferguson; and intervenor Melva Seamons and Roy Hill, dba Seamons Truck Line, appearing in person and by their attorney, Rex J. Hanson of the firm of Stewart, Cannon, Hanson and Baldwin; and intervenor Joseph J. Milne Truck Line, Inc., a corporation, appearing by its president, Joseph J. Milne, and by its attorney, Wood R.

Worsley of the firm of Skeen, Thurman and Worsley; and the Court having heard the evidence introduced in behalf of plaintiff, defendants and intervenors, and being fully advised in the premises, and the matter having been submitted, and the Court having heard and considered arguments of counsel, now makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the plaintiff, Wycoff Company, Incorporated, is a Utah corporation engaged in the transportation of property, to-wit: motion picture film, as a motor common carrier, for hire, over and upon public highways of the State of Utah as well as highways of other surrounding states; that defendants, Hal S. Bennett, Donald Hacking and W. R. McEntire are members of the Public Service Commission of Utah, a public corporation of the State of Utah, organized and existing under and by virtue of statutes of the State of Utah for the purpose of regulating public utilities within the State of Utah and among them motor common carriers, for hire, upon public highways of the State; that Melva Seamons and Roy Hill, dba Seamons Truck Line, and Joseph J. Milne Truck Line, Inc., a Utah corporation, intervenors herein, are engaged in the transportation of property, to-wit: motion picture film, as motor common carriers, for hire, over and upon the public highways of the State of Utah.

2. That motion picture films are distributed by national film organizations throughout the State of Utah, as well as throughout Idaho, Nevada and parts of Wyoming, Montana and Oregon by branch distribution offices located in Salt Lake City, Utah, named as follows:

Name	Address
Columbia Pictures Corp.	206 E. 1st South
Eagle Lion Classics	252 E. 1st South
[fol. 19] Loew's Incorporated	123 So. 2nd East
Monogram Pictures Inc.	254 E. 1st South
National Screen Service Corp.	212 E. 1st South
Paramount Film Distributing Corp.	270 E. 1st South

Name	Address
R K O Radio Pictures Inc.	204 E. 1st South
Republic Pictures Corp.	214 E. 1st South
Twentieth Century-Fox Film Corp.	216 E. 1st South
United Artists Corporation	210 E. 1st South
Universal Film Exchange Inc.	208 E. 1st South
Warner Bros. Pictures Distributing Corp.	200 E. 1st South

3. That as a matter of general practice, each shipment of motion picture film transported into the State of Utah and delivered to branch distribution offices aforesaid, is packaged in a paper board carton or box, each said shipment containing various numbers of thousand-foot rolls of film, which rolls are not wound upon metal reels nor otherwise ready for exhibition at theaters; that upon receipt of such a shipment or shipments of film at the Salt Lake City, Utah distributing offices, each roll of film (or original prints as they are sometimes called) is reeled through an inspection machine to check its condition upon its arrival, and determine whether or not it has been damaged during its transportation from laboratories and points outside the State of Utah to Salt Lake City, Utah; that thereafter these rolls of film are wound upon metal reels—2,000 feet of film to each reel—and to each reel of film there is affixed what is known to the trade as "heads and tails" to enable the proper use of the film in projection machines at exhibiting theatres; that thereafter said reels of film are placed in protective metal shipping containers and stored in fireproof vaults within said branch distribution offices in Salt Lake City to await the booking of the exhibition of these films at exhibitor theaters throughout the State of Utah as well as in other states heretofore mentioned.

4. That the inspection of motion picture film upon its arrival at branch distribution offices in Salt Lake City within the State of Utah, as well as the winding of the film upon metal reels, the attachment of "heads and tails" to each reel of film and the placing of the film in protective metal shipping containers are all necessary steps in the proper handling of motion picture film upon and after [fol. 20] arrival at branch distribution offices at Salt Lake

City, Utah, from points outside the State of Utah; that all such steps in the handling of film are necessary before the film may be reshipped within the state of Utah to exhibitor theaters in Utah for the showing of the film in these theaters.

5. That the film distributing companies do not sell any of the motion picture films to the exhibiting theaters but grant a limited licensed under the respective copyrights of the motion pictures. The licensing contracts for the exhibition of motion picture films at theaters throughout Utah are entered into between such theaters and branch distribution offices subject to approval by their respective home offices outside the State of Utah, that nevertheless under the terms of said uniform contracts none of said distributors are bound to deliver any certain motion picture film (feature, short subject, comedy, western or serial) to any certain exhibitor theater in any certain city, town or place in the State of Utah on any certain dates for exhibition thereof; that the exact dates of exhibition of films at theaters throughout Utah are not booked and agreed upon between exhibitor theaters and branch distribution offices until after said films are physically available in Utah for distribution, that is, checked, inspected, rewound, prepared and placed in protective, metal shipping containers, in vaults, within branch distributing offices in Salt Lake City, Utah.

6. That all motion picture films are developed and printed at laboratories outside the State of Utah, and transported into the State under transportation contracts with carriers, wherein film distributing organizations outside the State of Utah are the consignors and their respective branch distributing offices within the State of Utah are the consignees, and they pay the transportation charges as well as control the selection of the carrier and the routing of the shipments. However, after the films have been inspected, wound upon metal reels, prepared for projection machines and placed in protective metal shipping containers they are delivered F. O. B. at branch distributing offices in Salt Lake City, Utah, to carriers designated by theater consignees, and transported between said branch distributing offices and theaters throughout Utah, as well as between such theaters, and returned to branch distributing offices all under new

and different transportation contracts made between car-
[fol. 21] riers and local Utah theater exhibitors; that said Utah theater exhibitors are responsible for and pay all transportation charges; that motion picture films are rarely transported directly from points outside the State of Utah to exhibitor theaters in the State of Utah for showings; that the only exceptions to the general practice of handling motion picture films as detailed in these findings are the instances of weekly shipments of newsreels featured at a limited number of first-run theaters in Utah and other states, and the occasionally borrowed and directly shipped feature film to met play date emergencies, all of which films thereafter take their places in the regular distribution channels according to routine booking procedure as heretofore covered in the foregoing findings.

From the foregoing Findings of Fact, the Court now makes and enters the following

Conclusions of Law

1. That the defendants and intervenors are entitled to a decree of this Court finding that the transportation of motion picture film by carriers from the branch distribution offices of film companies in Salt Lake City, Utah, to theater exhibitors throughout the State of Utah, and the transportation of film between theaters within the State of Utah, and the return of the film to the branch distributing offices, are transportation operations in intrastate commerce, and subject to regulation by the State of Utah under applicable laws and statutes of said State, and the Public Service Commission of Utah; that the Public Service Commission of Utah, and the defendant members thereof, have not and are not interfering with the conduct of interstate commerce, nor have they imposed upon such interstate commerce any undue burden.

2. That the defendants and intervenors are entitled to a decree of this Court, denying plaintiff's petition for an order enjoining and restraining the Public Service Commission of Utah from interfering with transportation of motion picture film and newsreels by plaintiff over routes as authorized by the Interstate Commerce Commission.

Dated March 7th, 1951.

Willis W. Ritter, Judge.

[fol. 22] Received copy this 7th day of March, 1951.
Wayne C. Durham, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DECREE—Filed March 7, 1951

This matter coming on regularly for hearing before the Court, without a jury, on the 30th day of January, 1951, and the plaintiff, Wycoff Company, Incorporated, appearing by its president, M. S. Wycoff and its attorneys, Harry D. Pugsley, of the firm of Pugsley, Hayes and Rampton, and Wayne Durham; and the defendants, Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, members, appearing by their attorney, C. W. Ferguson; and intervenor Melva Seamons and Roy Hill, dba Seamons Truck Line, appearing in person and by their attorney, Rex J. Hanson of the firm of Stewart, Cannon, Hanson and Baldwin; and intervenor Joseph J. Milne Truck Line, Inc., a corporation, appearing by its president, Joseph J. Milne, and by its attorney, Wood R. Worsley of the firm of Skeen, Thurman and Worsley; and the Court having heard the evidence introduced in behalf of plaintiff, defendants and intervenors, and being fully advised in the premises, and the matter having been submitted, and the Court having heard and considered arguments of counsel, and having made and entered Findings of Fact and Conclusions of Law:

It is hereby ordered and decreed:

1. That the transportation of motion picture film by carrier from the branch distribution offices of film companies located in Salt Lake City, Utah, to theater exhibitors throughout the State of Utah, and the transportation of film between theaters within the State of Utah, and the film returns thereof, are transportation operations in intrastate commerce and subject to regulation by the State of Utah under applicable laws and statutes of said State, and the Public Service Commission of Utah, and that the Public Service Commission of Utah, and Hal S. Bennett, Donald

Hacking, and W. R. McEntire, members of said Commission, have not and are not interfering with the conduct of [fol. 23] interstate commerce, nor have they imposed upon such interstate commerce any undue burden.

2. That the petition of plaintiff, Wycoff Company, Incorporated, a corporation, for an order enjoining and restraining said Public Service Commission of Utah from interfering with transportation of motion picture film and newsreels by plaintiff over routes as authorized by the Interstate Commerce Commission be, and the same is hereby, denied.

Dated March 7, 1951.

Willis W. Ritter, Judge.

Received a copy of the foregoing this 6th day of February, 1951,

Wayne C. Durham, Harry D. Pugsley (L. P.), Attorneys for Plaintiff.

Clerk's Note

Notation of entry of Decree made on docket sheet March 7, 1951, in accordance with Rule 79 of Rules of Civil Procedure.

Direction to Enter Judgment

To the Clerk: Enter judgment in the above-entitled case.

Willis W. Ritter, U. S. District Judge.

Dated January 31, 1951.

Filed January 31, 1951.

In United States District Court

Notice of Appeal—Filed April 6, 1951

Notice is hereby given that Wycoff Company, Incorporated, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the Decree dated March 7, 1951.

[fol. 24] Wayne C. Durham, Elias D. Rees, Attorneys for Plaintiff.

Undertaking for Costs on Appeal filed in the United States District Court, April 6, 1951, for the sum of Two Hundred Fifty Dollars ($250.00) is signed by the United States Fidelity and Guaranty Company.

In United States District Court

Order—Filed May 16, 1951

Good cause appearing, it is ordered that appellant have to and including the 1st of June, 1951, in which to file the record on appeal in the above-entitled case with the Clerk of the United States Court of Appeals for the Tenth Circuit.

Willis W. Ritter, Judge.

In United States District Court

Order—Filed May 29, 1951

Good cause appearing, it is ordered that appellant have to and including the 21st of June, 1951, in which to file the record on appeal *appeal* in the above-entitled case with the Clerk of the United States Court of Appeals for the Tenth Circuit.

Willis W. Ritter, Judge.

In United States District Court

Statement of Points Relied Upon—Filed April 18, 1951

Comes now the plaintiff and sets forth the following points which it intends to rely upon in its appeal in the above-entitled matter:

1. That the Court committed error in law in excluding certain evidence tendered by plaintiff which would have proved that the out-of-state home offices of the local film [fol. 25] distributors exert a continuing control over the transportation of motion picture film within the State of Utah, which would have indicated that said transportation was interstate and not intrastate in character.

2. That the Court committed error in law by its decree which held that all the transportation of every type of motion picture film, namely, feature, short subject, comedy, western, serial and newsreel motion picture film, within the State of Utah, is in intrastate and not in interstate commerce.

Dated this 18th day of April, 1951.

Wayne C. Durham, Elias D. Rees, Attorneys for Plaintiff and Appellant.

IN UNITED STATES DISTRICT COURT

Transcript of Testimony and Proceedings

APPEARANCES:

Mr. Harry D. Pugsley, Mr. Wayne C. Durham, Attorneys for Plaintiff; Mr. C. W. Ferguson, Attorney for Public Service Commission of Utah; Mr. Rex J. Hanson, Attorney for Seamons and Hill; Mr. Wood R. Worsley, Attorney for Joseph J. Milne Truck Lines, Inc.

Reported by: E. M. Garnett and F. W. Otterstrom.

The Court: All right, gentlemen.

COLLOQUY

Mr. Ferguson: Before the case starts, I believe we might be able to confine the issues within a little narrower limits. I would like to present and make that proposal. I could serve counsel with the suggested copy. The pretrial order sets out No. 1: Whether or not as a matter of fact the carriage involved herein is interstate commerce. I have made the suggestion in this copy: Whether or not as a matter of fact the transportation of motion picture film and motion picture advertising matter wholly within points and places within the State of Utah is intrastate or interstate in character.

This may seem obvious that all transportation going across State——

[fol. 26] The Court: Don't argue it now. I think I will

state it more broadly than it is in the pretrial order: Whether or not—

The only carriage involved is motion picture film and motion picture advertising matter—that is all we are talking about; the evidence will disclose, I suppose, what the transportation is.

Can we stipulate to that, that this is a transportation of motion picture film and motion picture advertising matter wholly between points and places within the State of Utah?

Mr. Pugsley: No; we prefer to have the issues as stated in the pretrial order.

The Court: The proposed amendment will be denied then. We will proceed on the order as drawn.

Mr. Worsley: At the time of the pretrial hearing intervenor Joseph J. Milne had not gone to the full extent of factual stipulation with the Public Service Commission. You asked us to check up and be prepared to stipulate further, and in view of that with regard to the issue this morning that we have checked we stipulate our admission of facts to the same extent as the intervenor Seamons and the Public Service Commission.

I would also like to file the answer which conforms essentially to the other answers and which is in harmony with them.

The Court: Very well, it may be filed. Proceed with your evidence.

Mr. Pugsley: We would like to state the matter involved just briefly.

The Court: Is there anything other than you have stated to me two or three times?

Mr. Pugsley: We believe the issues stated in pretrial are sufficient. I will call Mr. Wade as our first witness.

The Court: You represent Wycoff Company, is that right?

Mr. Pugsley: Mr. Durham and I represent Wycoff Company, the plaintiff.

[fol. 27] CHARLES R. WADE was thereupon called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. Mr. Wade will you state your full name?
A. Charles R. Wade.
Q. What is the nature of your occupation?
A. I am branch manager of Universal International Film Exchange.
Q. Where is your place of business?
A. 208 East First South.
Q. You state you are branch manager. Where is the principal office and place of business of that company?
A. In New York.
Q. How long have you been engaged as branch manager?
A. Thirteen years.
Q. Has that been exclusively here in Salt Lake?
A. Yes.

Mr. Pugsley: Is this the International Film Exchange?

A. Universal.
Q. Will you state briefly what your requirements are as manager of the Exchange?
A. Sale of our pictures and solely distribution of our pictures in this area here which is composed of Utah, Idaho, Montana, and part of Nevada and part of Wyoming.
Q. I believe you said sale of your pictures; what is the nature of the so-called sale?
A. Through a form of contract or licensing of our pictures to play.

The Court: I don't suppose there is any doubt about that. No dispute about the nature. Isn't that part of your stipulation?

The Witness: It is a license.

The Court: There is a stipulation covering that.

Q. Would you state the type of film handled by your Exchange?

A. We handle what we call Feature Product, or pictures as the ordinary public would classify them, We call it Feature Product. We handle short subjects product and News reels.

Q. Do you handle film for the Armed Services?

A. Yes, we do; we handle for the Army Posts or camps and the Veterans' Administration.

[fol. 28] Q. Will you state the method by which this film is received at your Exchange here and what happens to it next?

A. The film is shipped in what we call a type of raw stock; it is shipped in here in containers, and then from that point on we have to mount the film on reels, what we call mounting on reels, put the film on a reel. It is broken down into a thousand feet on one container; then we have to splice them or put them together in a two-thousand foot reel. The News reels and some of the Short Subjects are handled in the same manner, only on a smaller reel, a thousand-foot reel.

Q. Those reels are the units sent out to the exhibitors, is that correct?

A. That is right.

Q. Do you maintain a record of the prospective showing places for your film in the territory?

A. You mean in the theaters?

Q. Yes.

A. Yes, we do.

Q. Do you have a department that handles listing and dating of those showings?

A. Yes.

Q. What do you call that department?

A. Booking Department.

Q. What is done by that department so far as their relationship to the Home Office, in informing the Home Office of your bookings?

A. All of the dates in one form or another are transmitted by correspondence, by mail, back to the New York office, and they in turn, from the information we give them on the play dates here go through their records back there—is applied to their records back there.

Q. Do you have a form of contract that you enter into with exhibitors?

A. Yes, we do.

Q. State if you change the method of making those contracts.

A. We maintain what we call Sales Representatives that cover the territory that I mentioned awhile ago, and they contact the individual theaters and theater managers for the sale, or for the licensing of our pictures; in turn they write up a contract; the contract is submitted to me and in turn is submitted to the Home Office for final approval. By the Home Office I mean to say the New York office.

Q. Is that the invariable rule? You are restricted to that rule in the handling of these contracts?

A. Every subject.

Q. Will you state whether or not there is a different, new type of contract as to Features as distinguished from the [fol. 29] Short Subjects and News Reels?

A. There are separate contracts; we also have separate contracts on some pictures—when I say Features, our Short Subject contract provides for Short Subjects only; they are written up for the series of the Shorts we license; it could cover three or four different series of Shorts we produce, or it could be confined to maybe one series such as Cartoon series.

Q. Would you explain the series as to whether or not when you have made these contracts, whether all the films to be exhibited under the series are then in your possession.

A. No, they are not all in our possession at the time we make the sale because as the Short Subjects are released they are shipped in to us for distribution in this territory by the Laboratory.

Q. Is it true then that the contract for the exhibition of the Short Subjects is made prior to the actual shipment from the Laboratory to you?

A. Yes in most cases, the greater portion of the cases.

Q. State to his Honor the method of contract as to News Reels.

A. News Reel is covered by either one or two issues, what we call our weekly releases, one issue is released on a Saturday, the other one released on a Wednesday during that given week; that procedure just keeps on automatically during the period of a year.

In contracting for a News Reels we either contract for what we call two issues which is contained on 104 News Reels, or we contract for one issue of 52 issues, which would cover the full period of a year. The contract in itself is handled in the same manner as our Feature Product or our Short Subjects, all submitted to the Home Office or the New York office for final approval.

Q. Then is it true that the contract covers delivery of News Reel covering events that have not yet happened even?

A. That is right.

Q. The reels themselves and the film *hs* not yet been produced?

A. That is right. It may be in the same manner as a newspaper, if you subscribe for a newspaper in advance. It is the same thing with a New- Reel which is our newspaper of the screen.

Q. You have stated your method of contract as to the Feature pictures. How is that handled at the present time?

A. The contract on the Feature product is handled in the same manner; the majority of the contracts are written or [fol. 30] licensed by either myself or a representative that we have in the territory some time prior to the time we have our prints in this office for distribution. The contract in itself is submitted by the sales representatives to me and I in turn submit those to New York for their final approval.

Q. When you say for approval, I will ask you whether or not that approval is an acceptance for approval?

A. It is an acceptance or a rejection either, by one of the officials of our company in New York. All contracts are not accepted because of maybe the terms.

Q. Are copies of these contracts retained in the New York office?

A. Yes sir.

Q. Are copies after acceptance sent to your office?

A. Yes. If the contracts are approved they send me two copies back, one for our file and one that we in turn send to the exhibitor with a letter advising him of the approval of that individual contract or picture.

Q. In what territory do you distribute these three types of film?

A. In Utah, part of Nevada, part of Wyoming, Idaho, a small portion of Oregon, and Montana.

Q. Do you know in advance of receipt of the film exactly in what State these films will be delivered?

A. In advance you mean?

Q. Yes.

A. No, I don't.

Q. And do you have a method that you follow in delivery from one theater to another theater?

A. Yes, we do. In most cases we try to circuit the print; because of our area the towns are so far apart we try to circuit the print from one town to another to save some time, which is a considerable amount of money as far as our distribution here is concerned.

Q. When you refer to circuiting, do you define that as relative to the return of the film to the Exchange?

A. I mean by that if the print of a picture, an individual picture, or even a Short Subject, if it happens to be in Idaho for instance and we want to send it to another point in Idaho that would be close by, rather than to bring that print back into our Exchange here in Salt Lake and then send it back out again—we lose considerable time—and in all cases where we can circuit a print from one town to another like that, we do it because of the amount of money and the time involved.

Q. I ask you whether or not in the course of ordinary [fol. 31] booking sometimes this circuiting is wholly within one State?

A. No, it is not always within one State; we might circuit a print from Idaho into Montana.

Q. Also you have occasion to circuit from one theater to another theater within the same State?

A. That is right many times.

Q. Does your company have another Exchange in the West?

A. Yes, we have what we call a shipping branch in Butte; that is supervised by myself out of Salt Lake. We have an Exchange in Los Angeles, one in San Francisco, Portland, Seattle, one in Denver.

Q. Have you worked in any other Exchange besides the Salt Lake Exchange?

A. Yes, I have.

Q. I ask you whether or not the procedure in handling

film and the distribution is uniformly directed by the company in all Exchanges?

Mr. Hanson: We object to that. He can testify about his own company.

The Court: If he has any knowledge. Do you have any personal knowledge what the practice is outside of this district?

A. Yes, I do.

The Court: You may testify. That is personal knowledge, is it?

A. Yes.

By Mr. Pugsley:

Q. Based on your personal knowledge and experience in your company's operations, state whether or not the other Exchanges handle the distribution of film the same as you handle it?

A. Just about the same.

Q. I ask you whether or not your company publishes a Manual of Directions that is sent to each Exchange?

A. Yes, they do. We have a national system and each of our branches are provided with this Manual. Our system is carried out the same in all branches, with the exception of maybe local—a few little local conditions that might deviate off the line a little bit.

Q. After a film has been shown in the various theaters with whom you have contracted, what is done with the film?

A. It is one of two things, either circuited by that theater to another theater, or if we have no booking set up on that [fol. 32] particular print it is either returned to our Exchange in Butte or in Salt Lake.

Q. Do you have occasion to send prints of a film from your Exchange area to another Exchange area of the Universal?

A. Yes, we do; there is occasions where a booking or date of a picture might be submitted to us for one of our towns in our territory and we don't have a print available, and I can cite a specific case of that; in handling a town like Couer d'Alene, Idaho, where it is way up in the Northwest, we would ask our Seattle branch to fill that date for us if

they possibly could, and in that case we probably would not even see the print ourselves or have any physical handling of it; it would be shipped out of the Seattle branch and right back to Seattle when the theater finished the picture.

Q. I ask you whether or not the New York office exercises any degree of control over your method of handling the film?

A. They do; when we make such a request as asking for what we term a loan print or borrowed print, our requests are made through our New York office for an additional print covering a booking.

Q. Do you advise the New York office as to all shipments made from the agency?

A. Yes; they daily receive a copy of our shipping sheet prepared here in Salt Lake, and in turn they record their records back there from the sheet.

Q. Does the New York office have authority, and do they on occasions, withdraw prints from your ordinary bookings?

A. They do.

Q. What happens to the film after all your bookings have been fulfilled and the film has been liquidated—and what is liquidation of a film?

The Court: You won't need to answer that question.

By Mr. Pugsley:

Q. What happens to the film?

A. After we have completed our bookings here then the film is dismantled, or we call it "junking," and in that case we prepare a junking list and submit to New York showing the condition of the individual print, and they in turn advise us their approval of junking these prints; then we dismount the print again, we take the film off the reels and we pack it in these big steel barrels and ship it back to the laboratory.

Q. Do you junk or physically destroy your film here in Utah?

A. No, we do not.

[fol. 33] Q. Accompanying film from time to time there is certain advertising material, is there not?

A. Yes.

Q. Do you handle the distribution of advertising material?

A. No, we do not.

Q. What company or agency does that?

A. The National Screen Service handles our advertising.

Q. Who prepares it for the National Screen Service?

A. That I am not too familiar with, just how it is handled, but our studio I know prepares the campaigns from that; who actually prints it I am not familiar with, whether the National Screen or ourselves.

Q. Do you know whether or not that is prepared and printed in Utah?

A. No, it is not.

Q. In making your prints for the exhibition of films, is that on a fixed fee or a percentage basis?

Mr. Hanson: Just a moment. The contracts themselves are the best evidence.

The Court: I think that is correct. Objection sustained.

Mr. Pugsley: We would like to pursue the matter in this respect, to show the custom——.

The Court: The custom is immaterial. *Lets* see what the contract says.

By Mr. Pugsley:

Q. Do you have any of the contracts with you at the present time?

A. No, I don't.

Mr. Pugsley: We would like to make a tender of proof, if we may, of the custom within the trade of handling; part of the contracting, on Features, on a percentage basis and part on a fixed fee basis.

The Court: What difference does that make in this State?

Mr. Pugsley: We believe it shows a further continued interest of the ownership and control and management of the film.

The Court: The management and control by whom?

Mr. Pugsley: By the New York office and the owners of the film and the copyright owner.

Mr. Ferguson: They have special contracts covering these special transactions.

[fol. 34] Mr. Hanson: The contracts themselves are the important things. We object to testimony on the contracts being gone into. When he is talking about what is in the contracts we would like to see them here.

The Court: Objection will be sustained. He may make whatever tender he wants.

Mr. Pugsley: We make that tender.

Q. Who determines the number of prints of a particular film to be sent into this area for distribution by you?

The Court: I am wondering what is the importance of this material—all of it. What difference does it make whether New York or Hollywood determines how many prints are made? What effect will that have on the nature of this transportation? That is the only thing in issue.

Mr. Pugsley: The issue is whether it is interstate commerce in character.

The Court: What bearing does evidence showing how many prints, who determines how many prints, have upon that?

Mr. Pugsley: We believe it is germane in this: it shows the continued control and continued intention of retaining interstate character.

The Court: The prints are made long before any control; as a matter of fact the motion picture producer determines how many prints he makes. I don't see how that determination one way or the other would have any bearing upon the nature of the carriage of advertising matter in Utah.

Mr. Pugsley: We think the actual fact is not the producer but often a distributor has a great deal to say about the number of prints to be produced and distributed.

The Court: It is like any other product being manufactured by a producer; he goes around the trade to find out how much market he is likely to have. Is that what you have in mind?

Mr. Pugsley: We want to show that determination is not made by the local branch.

[fol. 35] The Court: That doesn't have anything to do with transportation.

Mr. Pugsley: Our theory is it does, but we will submit it.

The Court: Well, go ahead.

By Mr. Pugsley:

Q. Who does make the determination as to the number of prints to be sent into an area?

A. That is arrived at by our past experience.

The Court: I am not going to permit you to go into all that monkey business—we will be here until July if we fool around with that. *Lets* get down to the nature of the transportation in Utah; that is what we are interested in.

By Mr. Pugsley:

Q. Mr. Wade, I direct your attention to the films that are exhibited to the armed forces in your area. Will you tell how the delivery of those is handled?

A. Yes. The Army and the Veterans Administration, particularly the Army, have set up what they term a B circuit and an A circuit, and the pictures are determined in New York by an Army representative back there; as these pictures are released he determines back there whether the picture is going to be booked, the individual picture is going to be booked in an A or B circuit that has been established, we having been notified to that effect; then as the pictures come along and are released, we are notified by our home office that the Army will book this picture on the A circuit in a given period——.

The Court: I do not see any relevancy to that.

Mr. Pugsley: We request him to state the places to which delivery——

The Court: Let's cut out these long-winded explanations preliminarily and get down to what happens in Utah; get down to what happens here. That is what we are litigating.

By Mr. Pugsley:

Q. To what points do you deliver film for the Armed Services?

A. The prints are shipped out of here; we serve Fort Douglas and we serve Fort Harrison, Montana, Great Falls Air Base and Boise Air Base and Hill Field and Clearfield.

Q. Do you have any Veterans Administration points that you also serve?

A. We serve the Veterans in Boise and in Harrison, Montana.

[fol. 36] The Court: Seems to me immaterial whether they serve outside of the State. The important thing is what goes on in Utah because we are concerned with the nature of the transportation wholly within points within the State of Utah. Confine your interrogatories to within the State points. Let's get this down to what we are litigating.

By Mr. Pugsley:

Q. Directing your attention to the points within the State of Utah of these Army circuits——

The Court: He has given you that, Fort Douglas, Clearfield, Hill Field.

By Mr. Pugsley:

Q. I would like to ask you how the delivery is handled as to those points of the films.

Mr. Hanson: Are you talking about the Government theaters now?

Mr. Pugsley: We are.

A. The Armed Services pick up most of these prints themselves.

The Court: So there is no carriage by a public carrier?

By Mr. Pugsley:

Q. Is that true in every instance, Mr. Wade?

A. I mean that is confined to being local—where close enough to pick it up; that does not apply to out of the State, no.

Q. We are asking just about points within the State.

The Court: That is not involved here; that is not a public carrier.

Mr. Pugsley: I wasn't aware of that, your Honor.

The Court: Have you taken this man's deposition?

Mr. Pugsley: No, I haven't. I talked with him yesterday in seeking information as to the method of carriage. I wasn't advised on that phase.

The Court: He is your witness; I assume you know what he is to talk about.

Mr. Pugsley: Not quite all.

Q. Will you state the method of handling delivery of film within the State of Utah from your Exchange to points within the State of Utah, how was that handled?

[fol. 37] A. Some of the prints are shipped direct to the theater, and some are shipped to play from one theater to the other, or one point to another; then they come back into the Exchange.

The Court: When you say "shipped"—find out what he means by that.

By Mr. Pugsley:

Q. What is the means of carriage you use, what transportation facilities do you use in moving the films within Utah?

A. Some by truck-line, some by *Parcels* Post, others by express.

Q. Who directs the points to which this film is to be shipped?

A. That is governed by the booking we receive from the individual theater.

Q. Is the point of delivery directed by you or by the individual theater?

A. The point of delivery?

Q. Yes.

The Court: It is delivered to the theater?

Mr. Pugsley: The practice of theaters circuiting I want to come before the court now.

A. The point of delivery? It is either by arrangement that the theater man makes with an individual truckline, or he might request we ship it by *Parcels* Post; might be an inland point where he has no means of transportation other than Parcels Post, or if there is no arrangement made at all we automatically ship the print express.

Q. Who makes up the billings to be handed to the truck-line or express company?

A. The billing for shipment?

Q. Yes.

A. The shipping clerk.

Q. That is the shipping clerk in your office, or whose office?

A. In our office.

Q. Is that true as to the movement of film from one theater to another theater within Utah?

A. No; in that case the print wouldn't come back into the Exchange. Say the circuit is set up from one town to another, by arrangement with the theater that is now playing the film or going to play it, he is notified after his use the print is to be shipped to this other point or other theater.

Q. Who prescribes that circuit?

A. We do.

Q. Is that in conformance with the rules and regulations set up by the New York office, or determined by you alone?

A. It is a standard ruling by our company; always has been.

[fol. 38] Q. Who directs the shipment after the film has been liquidated?

A. We do.

Mr. Hanson: We object to that as immaterial.

The Court: Sustained.

Q. Do you know whether or not the same procedure is followed as to points within the State of Utah in the movement of the advertising material?

A. That I cannot answer.

Q. Is the method of movement of film within the State of Utah the same for News Reels as it is for the Features and Shorts?

A. That movement is the same, yes; it is more so on the News Reels; it is circuited from one theater to another without returning as often to the Exchange.

Q. Is it customary for a theater to receive not only a Feature film but also some Short Subject film accompanying it?

A. Yes.

Q. What percentage of the theaters in the State of Utah receive in addition to a Feature picture, a Short Subject picture?

Mr. Worsley: Do you mean for one showing?

Q. For each week or each time showing?

A. I don't know whether I could answer that properly or not. It is not true in all cases because they might get the Feature picture from us and the Short Subject from some one else. That I wouldn't know.

Q. What percentage of the theaters in Utah exhibit at the same showing not only a Feature but also a News Reel, if you know?

A. I would say maybe less than 50 per cent.

Q. What percentage of the theaters in Utah, if you know, do you license Short Subject film to?

A. How many?

Q. What percentage of the theaters in Utah?

A. I would say 75 per cent.

Q. Do you know how many theaters there are within the State of Utah exhibiting film?

A. I am not sure because I haven't checked recently. I would say about 150.

Mr. Pugsley: That is all. You may inquire.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Wade, in your branch at Salt Lake City do you have a portion of it that is used entirely for the checking of [fol. 39] films and for the storage of film?

A. You mean inspecting?

Q. Yes.

A. Yes, we do.

Q. When film is shipped in here from outside the State, will you describe more minutely to the Court just the condition in which this film is received in that shipment?

A. That could vary, but we don't know the condition of the individual print until we actually have checked it, gone through the physical operation of checking it.

Q. I believe you misunderstand me. When the film is received from outside the State, isn't it a fact that is just the celluloid itself?

A. You mean the new film that has not been run? Yes, that is right.

Q. Just the celluloid itself?

A. That is right.

Q. And there may be five or six reels rolled into one bundle?

A. No; they come in individual cans, individual package or can, and that is put together by our inspectors over there.

Q. How much comes in each can?

A. Supposed to be close to a thousand feet.

Q. In each can?

A. Yes sir.

Q. Is that thousand feet featured off according to reels or not?

A. No; it is eventually measured off to reels; originally it is measured off by feet.

Q. But not when it is received?

A. Yes.

Q. You mean it is measured off in reels when it comes in from New York?

The Court: You mean it is not on a reel?

A. It is not on a reel, no.

By Mr. Ferguson:

Q. Is it in such condition that it could be put in a projection machine for showing?

A. No.

Q. Now describe to the court minutely what is done with this film after it is received at your branch office by your employees.

A. You are referring to new prints?

Q. New prints.

A. We mount the film, what we term "mounting" by taking these thousand foot reels—we take two of them and put them together on a 2,000 foot reel because no reel there to begin with; after mounted on the 2,000-foot reels, the complete picture in itself has been physically inspected and put together, then we put it in what we call our shipping cases which is a steel case.

Q. Do you also put what you call "heads and tails" on these films?

A. Yes.

[fol. 40] Q. Describe those to the court.

A. The head is a piece of film we put on there Operation of Universal Pictures; then we put a head on that one which is nothing but blank film for the benefit of the operator to thread his machine to start the picture right on a given point. Then the tail is just blank *filk*, that is the finishing off of the machine so it won't cut out too abruptly in the operator's machine.

Q. All of that is necessary, isn't it, before the film can be re-shipped from your distribution point here to a theater in Utah?

A. Yes, they go through that procedure.

Q. With every film?

A. Yes.

Q. I will ask you, Mr. Wade, could the shipment of film as you receive it from points outside this State, new film, be reshipped without touching them to a theater for showing in Utah?

A. No.

Q. Now what particular type of picture—does that also cover News Reels?

A. Yes, there is a head title on News Reels too.

Q. The same thing with regard to News Reels?

A. That is right.

Q. Now, after the picture is placed in your metal containers—the reels—I will ask you if these containers are placed in vaults in your office?

A. Yes, they are placed in the vaults if we don't have an immediate shipment.

Q. Now, do you sell any of these pictures to what we call exhibitors or theaters in the State of Utah prior to your receipt of these Feature pictures in your offices in Salt Lake City?

A. Yes, we do.

Q. What proportion of them?

A. Oh I would say at least sixty per cent.

Q. Sixty per cent?

A. Yes.

Q. You sell them without trade screening in the State of Utah?

A. Yes.

Q. Sixty per cent of them?

A. Yes.

Q. Will you describe the procedure you go through with regard to selling sixty per cent before you ship them?

A. We have our representatives that cover the territory that I mention, including myself, and they are constantly calling on the theaters for the licensing of these pictures.

Q. At the time you sell them I believe you have each exhibitor sign an individual contract?

A. Yes, we do.

Q. Now, do you set forth in this contract the exact date on which you will deliver a given picture at that theater?

A. No, we do not—very rare cases.

[fol. 41] Q. Is it not a fact that all you put into this contract is that when the picture is available you will set the dates for showing at the particular theaters in Utah?

A. That is right.

Q. Now, let me ask you this: is it not a fact that only after the film is available in Utah are the bookings made to these various theaters of the dates set?

A. That is right.

Q. Then and only then are the New York offices or the Hollywood offices notified with regard to the exact dates?

A. That is right.

Q. Now, when these films are shipped into Utah, then, for distribution in Utah, it is not known where you will prescribe these particular films, on what particular dates, to what particular theaters, is it?

A. That is right. We don't know at that time.

Q. When the films are received?

A. That is right.

Q. Do you have two types of contract, contracts known as general contract and bidding contract?

A. No.

Q. You don't have that?

A. No.

Q. Now, let me ask you Mr. Wade, you stated that the distribution office, your distribution office handles the billing of these films to the theaters in Utah?

A. That is right.

Q. The transportation billing.

A. That is right.

Q. Do you pay the transportation charges?

A. We do not.

Q. As a matter of fact they are paid by the exhibitors, the theaters?

A. That is right.

Q. Both ways, aren't they?

A. That is right.

Q. Do you handle the billing of the films when they are billed back from the exhibitors or the theaters in Utah to your Exchange?

A. I don't know what you mean by that.

Q. You have a billing that goes out that covers transportation between here and say Price, Utah?

A. That is right.

Q. You make it up in your distribution office?

A. That is right.

Q. That film when transported back from Price to your distribution office, you don't make a billing up on that, do you?

A. No.

Q. The exhibitor himself makes the billing on that?

A. Either the exhibitor or the truck-line or the express company.

Q. Anyway you don't make it?

A. No, we don't make it.

Q. The fact of the matter is you know as a matter of general knowledge that your contracts do provide, Mr. Wade, that the transportation cost——

[fol. 42] The Court: Better get the contract.

Mr. Pugsley: I don't object to that.

The Court: Maybe you don't but I do. We are getting the procedure in as orderly a way as possible here. Any evidence that is not admissible, I will stop him.

By Mr. Ferguson:

Q. Now, in the transportation of film in the State of Utah, isn't it a fact, Mr. Wade, that the great majority of all film is transported to the exhibitor theaters in Utah and returned to your distribution office for checking before they are transported to another exhibitor in Utah?

A. I wouldn't say they all are, no.

Q. I asked you if the majority of them were.

A. I wouldn't know the percentage.

Q. You wouldn't know the percentage?

A. I wouldn't know the percentage; when you say "majority," i.e. I wouldn't know that.

Q. Would you be willing to say the great majority of them were not returned for checking each time?

A. No, I wouldn't be willing to say that.

Q. You wouldn't be willing to say that?

A. No.

Q. Mr. Wade, I will ask you if in playing the pictures through a projector; if there is not, as a matter of fact, an occasional chance for damage to the films?

A. Yes.

Q. How do you determine in you transportation procedure between your distribution point and theaters in Utah, how do you determine, if the films are not returned to you each time, which theatre is liable for damage to these films?

Mr. Pugsley: We object to that as immaterial.

The Court: Overruled.

A. We merely trace back where the film is played,—by the condition of the print. In a case like that, we would merely have to go to the exhibitor, or contact him, and if he had played the picture and the print was in such a condition after it went to the next man, if he could run the print, then the print wasn't in that condition. We merely have to trace it back, have to leave it to the individual himself.

The Court: What counsel is getting at is: do you examine or do you have an opportunity to examine these films between exhibitions on the circuit within the State of Utah?

[fol. 43] A. No, I don't.

By Mr. Ferguson:

Q. Your exchange does not follow that practice?

A. What practice?

Q. Of examining films between showings?

A. Yes, we do, but in your case where a print is circuited——

Q. I didn't ask you if the print was circuited.

A. You said from one theater to another.

Q. I said out to that theater and back to your place. Isn't it a fact that the reason it is established is in order that you might have a chance to inspect the film each time,—is the reason it is required to be returned to your office after showing?

Mr. Pugsley: We object to that; that is not the question he presented.

The Court: He can present another.

Q. I will ask you another question, Mr. Wade, I will ask you if it is not a fact that the main picture distributors of film are in Salt Lake City—if it is not a fact that it is a policy adopted with regard to films, the fixing of liability with regard to transportation of these films in the State of Utah,—if it is not a fact they would prefer, and that they do——

The Court: Now you are getting in trouble there, asking him what the policy is; that calls for a conclusion; now you are asking what somebody else prefers. That is hearsay.

Q. What is the practice with regard to the return of film from an exhibitor theater before shipped to another theater, and not circuited?

A. The practice is the inspection of the film when it returns. It is not always handled that way because of what may be the amount of money we considered involved.

Q. Don't you prefer to handle it that way?

A. We prefer to but the physical distribution doesn't require it.

Q. Why do you prefer to handle it that way?

The Court: What difference does it make what he prefers?

Mr. Ferguson: To show the policy.

The Court: *Lets* find out what the practice is, what they do, but what he prefers to do is immaterial.

Mr. Ferguson: The fact hasn't been brought out, probably [fol. 44] can bring it out by another witness, to explain the nature of the contract for damage to the film, that the large percentage of the practice is to return the film from the exhibitors to the distributors each time before it is shipped out to another.

The Court: He has not testified to that practice. *Lets* find out about that.

By Mr. Ferguson:

Q. Mr. Wade, sometimes you send these pictures out on a circuit as you have described it; that means that the picture goes to one theater, it is exhibited there, that theater sends it on to another one and it is exhibited there, and so on through a number of theaters; finally it is sent back to you. Now you testified between theaters on a circuit showing you don't have an opportunity to examine the film. What I would like to know is: what is your practice where the film is sent on a circuit but sent down to, say, Murray, gets through there and comes back into your Exchange over here? Do you, when it comes back, examine the film to see if it is damaged?

A. Yes, we do.

The Court: Do you do that every time?

A. Yes, sir.

The Court: That a film comes back from a showing of that nature as distinguished from a circuit?

A. We examine it before it goes out again.

By Mr. Ferguson:

Q. With regard to circuiting, let's take an example of a film in a circuit; you send it out on the circuit, we will say to Ogden, by truck, by Wycoff's truck; who is it that pays the freight to the Ogden theater?

A. The exhibitor; the theater man.

Q. When it leaves the Ogden theater after showing, we will say it goes to a Brigham City, Utah, theater, who is it that does the billing?

A. The theater with the truck-pine.

The Court: You covered this; we find out the theaters bill it on, the theaters pay the trucking. You covered that once. As a matter of fact the theater pays the carriage coming back. He testified to all that.

Mr. Ferguson: I believe that is all.

The Court: Any of you other gentlemen desire to cross-examine?

Cross-examination.

By Mr. Rex J. Hanson:

Q. With respect to film which is transported from the [fol. 45] Exchange to a theater owner, the theater owner pays the carriage charges on that film too, doesn't he?

A. Yes sir.

Q. You don't ship any film or pay any carriage charges at all yourself, or your company doesn't?

A. That is right.

Mr. Hanson: That is all.

Cross-examination.

By Mr. Worsley.

Q. I presume when a film is re-examined after showing in Utah at your Salt Lake office and it is found defective and in need of repair, your office corrects that film, makes whatever repairs are necessary?

A. Yes sir.

Q. Also you check to be sure, don't you, that the film reels are properly wound and ready for showing at the next successive theater?

A. That is right; it is inspected every time it goes out before it goes out.

Q. Your inspection covers not only repairs but to see that the film is properly wound and cased?

A. That is right.

The Court: I don't see what materiality that has.

Mr. Worsley: Further handling in Salt Lake.

The Court: Further elaboration of the immaterial.

Mr. Worsley: I have no further questions.

The Court: Have to get it back here and examine it; that is important, has a bearing on the transportation, but the details, what they do with it here, I don't see any importance. Any further questions?

Redirect examination.

By Mr. Pugsley:

Q. You testified on cross-examination that the particular theater which the film is to be sent to wasn't known until the film arrived in Utah. I ask you if that is true of News Reels?

A. No, it is not.

Q. How about the Short Subjects sold in circuit?

A. That would be the same.

Q. The same as News Reels?

A. That is right.

Q. Those are predetermined prior to the time of arrival of the film in Utah?

A. That is right.

Q. Is that statement true as to all Features, that the ultimate destination, as far as exhibition is concerned, is not known when the film arrives in Utah?

A. I would say yes, it is not known.

[fol. 46] Q. Are there occasions, on an emergency, on which the film is sent directly to a theater for exhibition without coming to your Exchange first? I am referring to direct from the New York laboratory?

A. Yes, that would particularly be in the case of News Reels that are shipped directly to theaters from the laboratory in that case.

The Court: In that case (a) you don't have any trucking within Utah problem, and (b) you don't have the issue in this law suit. Isn't any question here about direct shipments from New York and Hollywood into this State to a theater.

Mr. Pugsley: Our position is——

The Court: *Lets* see what you have in mind.

Q. Assuming on certain occasions News Reel goes direct to a theater at a point in Utah, on occasions is that circuited to another theater in Utah without returning to your Exchange?

A. Yes, it could be in Utah or any other State out of the State of Utah too, but from that point on it is shipped to another theater.

Q. You testified as to the return of film for inspection within the state of Utah. I ask you whether that is customary as to News Reels the same as to Feature film?

A. Not so much with News Reels because News Reels is handled more on a circuit from one theater to another without returning to the branch because of the time element involved and the distance between our towns.

Recross-examination.

By Mr. Ferguson:

Q. Directing your attention to Short Subject reels, we will say one particular named reel, Passing in the Night, something like that, do you receive more than one reel of that particular film?

A. You mean one print?

Q. Yes

A. Yes, we do.

Q. You receive five or six from New York or Hollywood?

A. Might be two or three. We don't get them from Hollywood.

Q. Well, out of the State?

A. Yes.

The Court: Where do you get them from?

A. They come from New York or back in the East, New Jersey.

By Mr. Ferguson:

Q. Do you know as a matter of fact when the three prints arrive at your distribution point which one of these prints [fol. 47] go to a particular exhibitor or a particular area?

A. No, we don't. That is a method of booking.

Q. That is all booked here at your distribution office?

A. Yes sir.

Q. Directing your attention to News Reels; when News Reels are circuited, does the same rule apply that each theater re-bills the News Reel by truck or transportation to the other theater in Utah?

A. Yes.

Q. And they pay the transportation charge?

A. Yes.

Cross-examination.

By Mr. Hanson:

Q. With respect to News Reels, isn't it only the larger theaters in Salt Lake City and Ogden who have a predetermined contract with the people in New York for showing the News Reel at a certain time—at a certain date?

A. No; that applies all over.

Q. You mean to say all the small theaters in the small towns have this same type of contract written for large theaters in Salt Lake on News Reels?

A. Yes sir.

Q. The News Reel is shown simultaneously in every theater in the State?

The Court: No, not necessarily simultaneously. What he is saying is, like I subscribe to the Salt Lake Tribune; I go up and purchase a subscription this morning for the Tribune delivered to my door; not only is the Tribune not printed that will be delivered to my door next August 15th but the news it will contain has not yet happened. Exhibitors contract for News Reels in the same way; not only is the News Reel not yet manufactured or made, but the news it contains has not yet happened. He says theaters contract in advance for News Reel, the way you and I contract in advance to buy a newspaper. That was his testimony.

Mr. Hanson: My question is whether or not the larger theaters had the first run on News Reels and would not on——

The Court: If that is of any importance here. I don't see that it is.

Mr. Hanson: I will withdraw it, your Honor.

Dedirect examination.

By Mr. Durham:

Q. Is it possible for the New York office of your company [fol. 48] to tell today, for instance, where all of the News Reels that you handle are—what particular theater they are in?

A. They have an identical record that is established from here in the position, in the time that we place the News

Reel in an individual theater, that is submitted at the same time we submit a license contract, that form is submitted; we have to show the position and the theater and the number of days it is playing in that theater, and they keep an identical chart, what we call News chart—the position, and from that information we advance to them they make entry on their chart back there, so it is identical to what we have here.

The Court: Any further examination of this witness?

Mr. Pugsley: May he be excused at this time?

The Court: You may be excused.

Mr. Worsley: If you propose to show any later contract we will want to examine with regard to that.

Mr. Pugsley: We have no proposal to put in a contract from this company at all.

The Court: You may be excused.

ELLIOTT S. WINDWARD was thereupon called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Durham:

Q. Will you state your full name please.
A. Elliott S. Windward.
Q. What is your occupation Mr. Windward?
A. Office Manager R K O Pictures, Inc.
Q. Where is your office located?
A. 204 East First South.
Q. And where is the home office of R K O located?
A. New York City.
Q. You have heard the testimony of Mr. Wade.

The Court: No, we don't have witnesses compare testimony in that way. Just ask this witness questions.

Q. Will you describe briefly what the nature of your duties are here, Mr. Windward, with R K O?

A. Supervision of operation of the Branch and the Branch personnel.

[fol. 49] Q. You receive motion picture films there, or don't you?

A. Are you talking of new ones?

Q. New motion picture films, where do they come from?

A. From New York and from Los Angeles.

Q. Will you describe briefly how motion picture films are booked in the State of Utah by R K O?

A. There are different procedures of booking; the salesman will secure a date and submit them to the office; the exhibitor will submit them through letter, telephone, telegraph of which other procedures there are; we in turn will endeavor to place the booking in the booking records of the prints we have available.

Q. Does your local office determine the play dates or are they determined by the New York office?

A. The exhibitor determines the play dates.

Q. Can an exhibitor determine any date he wishes?

A. He selects the date; we endeavor to put the booking in the booking records.

Q. If there is a conflict, if the exhibitor wishes a date and you cannot find that date, who determines it?

A. We determine whether we can make the booking or not; if we cannot make that particular date, we in turn notify the exhibitor that it is not open and endeavor to have him select another picture or submit another date.

Q. What role does your New York office play, if any, in determining the date that pictures will be played in Utah?

A. That is specified in the terms and conditions of contract.

Q. Does your local office have the power to make a contract?

A. No; we solicit contracts and New York approves the deal.

Q. Only New York has the power to make a contract?

A. That is right.

Q. Do you have occasion to circuit motion picture film?

A. Yes.

Q. Do you handle News Reels?

A. No.

Q. Do you handle Short Subjects?

A. Yes.

Q. Is there a difference between the handling of Short Subjects and Feature motion picture film?

A. Oh yes.

Q. Will you explain what that is, briefly?

A. Yes. Feature contracts, depending on what we call the caliber or the classification of the production, is booked according to its classification; in other words, a top picture will carry a percentage arrangement.

Q. What do you mean by a percentage arrangement? [fol. 50] A. That is where a picture is sold to an exhibitor under percentage sharing arrangement. We also have what is known as flat rental arrangement.

Q. Who shares in the percentage arrangement? Who receives parts of the box office receipts?

A. The exhibitor and the distributor.

Q. The distributor being the parent company?

A. That is right. Your Short Subjects you were asking about, those in the majority of cases have what is known as no preferred play time; there is no extension of preferred play time on Short Subjects.

Q. If you have booked a particular film in a Utah theater and you receive instructions from your New York office to ship it some place else, what would you do, Mr. Windward?

A. I didn't quite understand that. You mean if we had a booking established on that print and New York asked us to relinquish that booking and the print, we couldn't do it; it would be practically an impossibility without the authorization of the exhibitor; that is his booking; we have confirmed it to him and we would then have to receive his authorization to withdraw that booking; in the event New York was requisitioning that print for some other section, we couldn't take his booking without his approval.

Q. What means of transportation, Mr. Windward, do you use to distribute motion picture film in the State of Utah?

A. *Parcels* Post, trucking, express, and personal pickup.

Q. Who determines which method of transportation will be employed?

A. The exhibitor.

Q. Can you state whether or not your office exerts any control over what shipper will be employed? Must certain

requirements be met by carriers for you to release films to it?

A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.

Q. The home office requires approval?

A. Yes.

Q. Have you known of occasions where your home office has disapproved carriers within Utah?

A. Not to my knowledge.

Q. After the theater *whixh* has the motion picture film is through with it and is going to circuit it to the next theater, who has the determination where the next showing will be made of that film?

A. The distributor. We do that.

[fol. 51] Q. You do that?

A. We do that.

The Court: That is, the booking?

A. That is the booking problem.

The Court: You have all these pictures booked around a circuit. Your bookings determine. I think that would be obvious.

By Mr. Durham:

Q. Directing your attention to bookings, who determines as between the exhibitor, your office and the New York office in what order bookings will be made?

The Court: He has already explained that. The theater exhibitor requests the film on a certain date, so he starts the thing going, and then if Mr. Windward's office cannot supply the print he advises them and says: don't you want another picture on that date, or do you prefer a different booking date. He has testified to that already.

Q. No booking is made until a contract has been entered into?

A. No.

Q. And no contracts are made except upon approval of your New York office?

A. That is right.

Mr. Durham: I believe that is all.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Windward, in your studio the method and procedure with respect to contracts—when you make a contract with an exhibitor, before sending it to New York, you only enter into it for the number of days in which you will give the exhibitor that picture, not the exact dates?

A. That is right.

Q. The booking is done after the exact dates are set, after the films are available here in Salt Lake?

A. I will give you a little further explanation; we have what is known as competitive bidding in the sale of our product; some of the companies don't have that. In some instances embodied in that bid is included a specific date that that picture will be exhibited; under those circumstances we must, if the contract is approved, book that picture on that definite date. In the event we don't have a print to cover that engagement it is absolutely necessary that we secure a print; if our stock supply of prints are not equal to that, we must have a print. That is a part and [fol. 52] parcel of that contract under a competitive bid and it must be covered.

Q. That competitive bid procedure is followed after the screen showings here in Utah?

A. That is right.

Q. Also, Mr. Windward, when films are received from out of the State, that is, a new print is received from out of the State, before it can be sent on to the Utah theaters for exhibition isn't it necessary that these prints have to be checked, wound on reels, heads and tails placed on them for projection work?

A. Yes, and there is an explanation to that. May I explain it?

The Court: Yes.

A. We have what is known as—all companies do—a territorial break; that is where one of the more outstanding pictures is pre-released, this territory is authorized to have

the distribution of that picture ahead of any other out of the country. In that case there will come into this territory as high as 30 to 40 prints. There has been, I think I would say forty prints of outstanding pictures. Those prints are shipped in here and they are all mounted and ready for distribution the same as our own prints in our own vaults. There is also where a print is borrowed from one Exchange to another Exchange; that print may be a new print from the Los Angeles office, Seattle, or even clear back to New York. That print arrives here mounted and ready for distribution, and after the completion of the engagement it is borrowed—the same as territory breaks; these prints are sent back to the respective offices we control throughout 32 offices in the United States.

Q. On these territorial breaks where forty prints are sent into the State ready to be sent to exhibitor theaters, they come to your film distribution depot here, it that right?

A. Yes.

Q. Then they are sent out by truck, say, they are sent FOB at your office to the exhibitor?

A. Not necessarily truck; by means of whatever selected distribution is made by the exhibitor.

Q. But the transportation contract is entirely between the exhibitor and the carrier?

A. Yes; the only exception I was making is that you were referring to all prints coming in here that had to be mounted; I was making that exception and explaining it to you; there are exceptions.

[fol. 53] Q. There is occasionally that territorial break?

A. Yes.

Q. Is it the usual practice with your company, the RKO people, that after showings of films by exhibitors in the State of Utah, that they be returned to your offices here for checking and inspection before being shown at other theaters?

A. Yes, and on other occasions where the exhibitor himself makes requisition for a circuit between his own theaters, we have that occasion; then the film is circuited by the exhibitor to his next theater and then returned to our office.

Cross-examination.

By Mr. Worsley:

Q. You maintain at all times in Salt Lake City a substantial number of films in storage here, do you not?

A. That is right.

Q. That necessity arises (1) from the lapse between the bookings of the same films, or (2) from the fact there may be films you are holding as to which at one particular time you have no booking?

A. That is right.

Cross-examination.

By Mr. Hanson:

Q. So far as the motor carrier transportation is concerned, your company is primarily interested and only interested in whether or not the carrier is licensed by the State or by the Government in case of interstate, and that it carries insurance, is that right?

A. And his plan of operation enters into it considerably.

Q. Does your company enter into any kind of contract with these carriers at all?

A. No, other than insurance—no, that wouldn't be a contract.

Q. The carrier gets his own insurance and contract with theater owners themselves?

A. And must have a copy of his insurance to prove it is satisfactory.

Q. You have a screening room at your place of business here, don't you?

A. No.

Redirect examination.

By Mr. Durham:

Q. Directing your attention to what is called "junking" of a print, will you describe briefly what the nature of RKO policy is after a film has been liquidated?

Mr. Ferguson: I will object to that as immaterial.

[fol. 54] The Court: It is not proper redirect but I will let him go into it. Objection overruled.

A. The life of a film is determined by the number of bookings; we figure between 45 and 50 bookings is the life of a print. On a technicolor print the life of the bookings is less; it is more perishable a lot of times depending on the handling of the print by the exhibitor. A lot of times the prints are damaged to an extent that they are what we call out of service.

A. When this takes place what disposition is made of the print?

A. After the print is out of service or the contract is liquidated, we dismount the prints and junk them, put them in barrels and ship them back to New York. All that procedure is under the authorization or approval of New York.

Q. Do you know why the prints are sent back to the New York laboratory?

The Court: That is immaterial.

Mr. Durham: I believe that is all.

Recross-examination.

By Mr. Hanson:

Q. Are your company's films screened before they are sent out to the theaters for showing?

A. Practically every feature we have is screened with very few exceptions.

Q. At that screening the exhibitors come in the screening room, look at them and decide which ones they want?

A. They are invited to come in.

Q. And so far as the particular film is concerned you don't know until it has been screened and has been purchased by the exhibitor where it is going to go?

A. That is right, we don't know.

Redirect examination.

By Mr. Durham:

Q. What percentage of the industry, the theaters that you serve, go in for screen showings? It is a large or small percentage?

A. Nil—it is way down. The screening of our pictures I would say there is an average of about six people attend.

Mr. Durham: That is all.

The Court: Any further examination? The court will be in recess five minutes.

[fol. 55] (Recess.)

The Court: Call your next witness.

THOMAS A. MCMAHON, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. What is your name?
A. Thomas A. McMahon.
Q. What is your business?
A. Branch Manager, Republic Pictures Corporation.
Q. Where is your place of business?
A. 214 East First South.
Q. Where is your principal office?
A. 1790 Broadway, New York.
Q. State briefly the nature of your responsibilities as Branch Manager.
A. Sale and distribution of motion pictures for the Republic.
Q. In what area?
A. Salt Lake City Exchange, which consists of Utah, Nevada, Wyoming and a part of Oregon and Idaho.
Q. How many theatres are there in that area?

The Court: That is immaterial. How many theatres are there in the State of Utah?

A. I would say practically 90.

The Court: One said 150 and this man says 90.

Q. Mr. McMahon, do you serve all the theatres in the State of Utah?
—. Not all of them.
Q. The figure you have stated, is that the number served by you?

A. That we sell.

Q. Do you know what percentage you sell of the total theatres in Utah?

A. I would imagine we sell about 70 *per-cent*.

Q. From what point is the film produced that comes to you?

A. From Fort Lee, New Jersey, at our laboratories.

Q. Where is it returned after it is liquidated?

A. To Burbank, California, and to Eastman Kodak, in Rochester, New York.

Q. Would you state your method of contracting on the feature film?

A. My salesmen and myself go out and contact the [fol. 56] various exhibitors, the same as Mr. Wade explained, and Mr. Winward.

Q. Do you have any screening of the film?

A. We do not sell the same way as some of the major companies do.

Q. What is the method of booking in advance the exhibition of these features, as to the time of production, in your company?

A. Well, we go out and sell a prescribed number of pictures at the beginning of the sales year. We try to set up a release schedule during the 12 months of the release year, so many pictures for the month, say September, at the beginning of the selling year, and about so many in October. We try to conform to a production schedule.

Q. Calling your attention to the pictures for the 11 months' period, are those normally produced at the time of your contract?

A. No, because they run into story difficulties, production difficulties. We can't always hold to a production schedule.

Q. Are a number of your features what are termed "low budget production"?

A. Yes, quite a few of them.

Q. What is the average time of production?

The Court: What difference does that make, how long it takes to produce a picture?

Mr. Pugsley: Merely to show that the features are contracted for a particular delivery prior to the time of production.

The Court: Ask him about that, if they are contracted for prior to the time they are produced.

Q. Will you answer the question presented by His Honor?

A. Yes, in this way, we go out and sell six Roy Rogers in June. By May of next year we will have completed those six Roy Rogers; so the exhibitor has contracted for six Roy Rogers.

By the Court:

Q. Before they were produced?

A. Yes.

By Mr. Pugsley:

Q. What is the release date?

A. The release date is predicated on the finish date, also the release date set by the Sales Department.

Q. Is that here in the Salt Lake Branch Office?

A. They advise us of the national release date.

Q. Who is that done by?

A. The General Sales Manager in New York.

[fol. 57] Q. Do you handle the production and distribution of short-subject films?

A. We have serials which are made of 13 episodes and run for 13 consecutive Fridays and Saturdays.

By the Court:

Q. Are they contracted for before they are produced?

A. Yes.

By Mr Pugsley:

Q. Likewise contracted for before they reach the State of Utah?

A. That is right.

Q. What is your practice as to the circuit of film in the State of Utah?

A. We try to do that. We operate a minimum number of prints. We try to regulate it as cheaply as we possibly can, and by circuiting we eliminate buying extra prints.

Q. Do you handle anything besides the feature film, the serials? Do you handle any news reels?

A. No.

Q. Do you have any film for the armed services?

A. Yes.

Q. What is the method of distribution on that?

A. We are advised by our home office in New York that we have, now, a short to distribute for the Army, to the various camps; and the San Francisco office of the Army advises us of the bookings to their various camps, and we follow out the procedure for them. They set-up their schedules or bookings.

Q. Are they all booked up from your Exchange here in Salt Lake?

A. Not the Army Air Base, in Great Falls or Fort Harrison.

Q. Do they move to those bases from Utah?

A. Yes.

Q. Do you know whether a common carrier is used for that purpose?

A. That I don't know.

Q. Do you know whether any carrier is used in circuiting from a base in Utah to a base outside of the State of Utah?

A. No, I imagine it would be by Express.

Q. In what type of containers do the films come to you for distribution in this area?

A. In paper cartons, and the prints are in thousand-foot cans, as Mr. Wade explained.

Q. What procedure do you follow for exhibition?

A. We mount them on 2,000-foot rolls, store them in the cans, put them in the vault, waiting for bookings.

Q. Is that true as to all film that comes to you from outside of the State of Utah?

A. With the exception of borrowed prints that we may get from Los Angeles, San Francisco or Denver, which we do get quite a considerable amount of the time.

[fol. 58] Q. Do you have any of those so-called borrowed prints sent directly to the theatres in Utah?

A. Yes.

Q. What happens to them after that?

A. They are returned to the Exchange we borrowed them from.

Q. On occasion, do you circuit those borrowed films in the State of Utah?

A. We have on occasions, yes, when we could get an extended period of time for the *useage* of the print. I might qualify that with the remark that there are times when we can borrow prints out of our Los Angeles Exchange for a period of 30 to 45 days before the Los Angeles City break comes in, then we try to get as many bookings as possible within the 30 days. That is when the circuiting occurs.

Q. After the completion of that circuiting, what do you do?

A. It is returned back to Los Angeles, or wherever we borrowed the print from.

Q. That is shipped how?

A. In the regular container.

Q. Who determines the prints you have available for showing in the Utah area?

A. That is determined by our Print Department in New York, on our past experiences of liquidation with similar type pictures.

Q. When they send these to you for exhibition, from the New York studio, are they designated for the Utah area?

A. For the Salt Lake Exchange area.

Q. Who has the final proof of the acceptance of the contracts that are written to your agency?

A. The General Sales Manager in New York.

Q. What is done, so far as the copy of the contract executed by the exhibitor, is concerned?

A. The copy is retained in our home office, one for our files, and a copy is sent to the exhibitor.

Q. Do you have more than one type of contract that you use, for the printed form?

A. We just have the one type.

Plaintiff's Exhibit 1 marked for identification.

Q. I show you what has been marked Plaintiff's Proposed Exhibit No. 1 and ask you to examine it and after examining it will you state what that is?

A. That is our standard form of contract.

(Proposed Exhibit 1 submitted to Counsel.)

Mr. Worsley: No objection.

Mr. Pugsley: We offer it.

[fol. 59] The Court: It may be admitted.

Q. Referring now to Plaintiff's Exhibit No. 1, is this the type of contract that is used in conjunction with every theatre with whom you contract in the State of Utah?

A. Yes.

Q. Is it under this type of contract that your circuiting of films is likewise arranged?

A. There is no contract used for circuiting of films.

Q. You have no contract other than this?

A. No.

The Court: What is the status of the case in the State Court?

Mr. Ferguson: It is held in abeyance; nothing has been done at the present time. There is no service upon the defendants.

Mr. Pugsley: It is not in issue.

Q. Do you have occasion to withdraw the prints from the area over which you supervise?

A. Yes. There are times that we receive calls from New York, from our Print Department, that they are urgently in need of prints—or Chicago or Los Angeles or New York direct.

Q. Do you abide by those directions from the New York office?

A. We try not to upset our picture schedule that we have already maintained with an exhibitor.

Q. By your instructions from your New York office, what is the authority you have to follow for confirmation of a contract without acceptance by New York?

The Court: Why don't you get at it directly: Do you enter into any picture contracts without New York?

A. No sir. They have to approve.

By the Court:

Q. They have the final word?

A. Yes.

The Court: Go ahead.

Mr. Pugsley: That is all.

Cross-examination.

By Mr. Ferguson.

Q. Mr. McMahon, you stated that all contracts must be approved by the office in New York; I mean you stated that the contracts were approved by the office in New York before the films reach Utah?

A. That is correct.

[fol. 60] Q. Were the exact dates of the delivery of films, as to the various exhibitors in Utah affixed in those contracts when they are approved?

A. No, they could not. No.

Q. They could not be, could they?

A. No.

Q. As a matter of fact, Mr. McMahon, they are not affixed until after the film is available in Salt Lake City, is that right?

A. That is right.

The Court: What is that?

Mr. Ferguson: The play dates in Utah.

Mr. Hanson: The exhibit dates.

A. We can see we have an availability date, and we can go ahead and accept dates within that availability date. I may sell a contract now on some features that have already been released. We know the dates on them.

Q. And you will set the exact playing date?

A. You can do it when the pictures are released.

Q. Before the picture arrives in Utah?

A. No, not before it arrives.

Q. The picture must have arrived in Utah?

A. Yes.

Q. That is what you meant when you stated until after the pictures arrive in Utah and are checked and they are placed in the vault to await booking?

A. That is right.

Q. You mentioned borrowing some film from Los Angeles. That does not affect your booking dates in Utah, does it?

A. Oh yes, it does, in this respect, that you maybe have three prints as your normal prints, and you may have

five bookings; so you have to borrow two additional prints from Los Angeles, or wherever you can borrow them, to cover those bookings.

Q. When you ship from Los Angeles, they do not determine when the film will be booked in Utah?

A. No, that is up to us.

Q. Now referring to your contract, I notice in the terms of the contract here—I am referring especially to Section 4, "Loss and damage to prints". What is the procedure of your company under this particular provision of the contract in regard to determining which exhibitor is responsible for loss and damage or what transportation company?

A. As each print comes back, it is inspected and the condition of each one of the releases is noted on what we call a vault card, which gives the exact condition of the print after every run.

[fol. 61] Q. Then, Mr. McMahon, do I understand you that when a film is shipped out of here, we will say to a theatre in Price, Utah, for showing, that the usual practice is for the film to be returned to your studio or your distributing office in order that it may be inspected before it is played in another theatre?

A. We try to do that.

Q. That is the general practice?

A. Yes.

Q. In the cases where you ship film to theatres in Utah, by a common carrier truck line, you deliver that film to the truck line f.o.b. at your distribution office?

A. They pick it up in our office.

Q. And the exhibitor, in all cases, is liable for the freight charges?

A. That is right.

Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?

A. The exhibitor enters into the agreement with the common carrier—we don't.

The Court: Any further examination?

Further Cross-examination.

By Mr. Worsley:

Q. Your schedule applies only to the dates after the film is available for showing?

A. It applies to the dates the film will be available for showing, after the national release date.

Q. It has nothing specifically to do with the exact place or date of the showing?

A. No.

Q. On your circuiting, that you mentioned, that is essential where one operator has a series of theatres within Utah, it is not?

A. Not necessarily. We have had occasion to circuit from Price to Huntington, from Price to Dragerton and so on, particularly down in that area, to save our time.

Q. To a different theatre only?

A. That is right.

By Mr. Ferguson:

Q. You say that was in the Price area?

A. Yes.

Redirect examination.

By Mr. Pugsley:

Q. Directing your attention to the carriers, does your company require prior approval of the carriers before they are permitted to transmit or carry your film?

A. They must be bonded, and they must provide insurance, they must carry insurance for loss or damage to the prints.

Q. So far as you know, the three carriers who appear [fol. 62] in this proceeding—the Wycoff Company, Inc., the Milne Truck Line, Inc., and Roy Hill are so approved?

A. That is right.

Mr. Pugsley: That is all.

By the Court:

Q. Mr. McMahon, you testified that the Republic Pictures manufacture serials?

A. Yes sir.

Q. They manufacture pictures like Roy Rogers pictures —what do you call those?

A. Those are Westerns.

Q. Westerns?

A. Yes.

The Court: They are pretty good pictures, too? They interfere with my family life, on television. Now you testified that those are sold and that bookings are made on them before they are produced, sometimes, is that generally so?

A. The Westerns and the lower-grade pictures.

Q. Those are what Mr. Pugsley called budget pictures.

A. That is right.

Q. Are certain dates contracted for on those pictures before they are produced?

A. They try to set them up on a release schedule, I believe, of about every eight weeks or nine weeks.

Q. So you have an approximate date?

A. An approximate date, yes.

Q. You do not have a particular date?

A. No, because it may vary on the production schedule. It may go off, something like that.

Q. When these pictures are produced and shipped in here, are they shipped directly to the theatre that exhibits them?

A. No sir.

Q. Are they shipped to your film Exchange?

A. Yes.

Q. When they arrive at your film Exchange, they are processed as you describe?

A. Yes.

Q. You take them out of a thousand-foot container and put them together and put them in a two thousand-foot roll?

A. Yes.

Q. So you have no immediate need for them?

A. No.

Q. They come to rest in your place of business for a while?

A. For a while.
Q. For a short while?
A. That is right.
Q. Then they are sent out to the trade pursuant to your bookings?
A. That is right.

The Court: All right. Any further examination?
[fol. 63] Mr. Pugsley: We have nothing further.
The Court: All right, step down.
Mr. Pugsley: May he be excused? We offer Exhibit 1.
The Court: It is received.
Mr. Pugsley: May we offer, for the record, the Exhibit which was designated Exhibit No. 1 at the pretrial. As I recall, there was no objection at that time.
The Court: Have it marked for identification.
Mr. Pugsley: It has been marked, I believe, and placed in the record.
The Court: It was marked for the pretrial, but we mark all these Exhibits for the record again at the pretrial.

Plaintiff's Exhibit No. 2 marked for identification.

(Exhibit No. 2 submitted to Counsel.)

The Court: Any objection?
Mr. Worsley: We have no objection.
Mr. Hauson: No objection.
Mr. Pugsley: I offer in evidence Exhibit No. 2.
The Court: It is received. Call your next witness.

CHARLES L. WALKER, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. Will you state your name, please?
A. Charles L. Walker.
Q. What is your business?
A. Branch Manager, 20th Century Fox.
Q. Your location is what?

A. 216 East First South.

Q. Where is your company's principal place of business?

A. 444 West 55th Street, New York City.

Q. In operating your branch office here, are you under the direction of that office in New York, or any other office?

A. Under the direction of the San Francisco office and in turn, New York City.

[fol. 64] Q. I believe you have been subpoened by the State of Utah to appear as a witness here, have you not?

A. I have.

Q. You talked to me yesterday concerning this matter?

A. Yes.

Q. At my request?

A. Yes.

Q. Will you state your procedure in the handling of the bookings and the distribution of feature film?

A. Within the State of Utah?

Q. Within the State of Utah, within your area?

A. Well, the prints that are received from New York are from the laboratories. When they are received they are mounted on the 2,000-foot roll and then put in the cans, awaiting bookings. The sales are handled by myself and the salesmen. We take an application for a contract direct from the exhibitor. Those contracts, in turn, are submitted through the division office in San Francisco and in New York. New York has the final approval of the contract.

Plaintiff's Exhibit No. 3 marked for identification.

Q. I show you what has been marked Plaintiff's Exhibit 3, Mr. Walker, and ask you to examine it.

Q. Will you state what that is?

A. That is a picture contract for our product.

Q. Is this the standard form that you referred to?

A. Yes.

(Submitted to Counsel.)

The Court: Do you offer that?

Mr. Pugsley: Yes, we offer Exhibit 3.

(No objection by other Counsel.)

The Court: It may be admitted.

Q. Do you follow the procedure of screening, in your sale of features?

A. Yes, we very seldom, if ever, solicit the account on feature products until we first have a trade showing. In other words, the print is sent from New York ahead of the actual time we start selling it. We determine a definite date for a trade showing. We notify the exhibitors and after that date we sell the feature. We do not sell it before the showing.

Q. How many prints do you have in your office prior to the trade showing?

A. We always have the one print; sometimes two, three. [fol. 65] or four—whatever our allotment might be.

Q. Do you handle other things besides the feature film?

A. Yes, we handle short subjects; that is, one-reel subjects, the news and the March of Time.

Q. State your method of contract as to the short subjects.

A. On the short subjects we write a contract on the basis of a year, covering the entire product, or a portion of that product. On the March of Time, that is sold on a yearly basis. There are eight issues. They are released on an average of about one every six or seven weeks. The news-reel is sold on a yearly basis. However, there are times we sell some of the accounts one year, two years, three, four or even five years.

Q. The short subjects and the March of Time, are they frequently sold prior to production?

A. Yes, very frequently, on the different years. We will sell the March of Time and the short subjects six months to a year before the particular season involved.

Q. What area do you handle from your office in Salt Lake?

A. We handle the State of Utah, part of Nevada, Montana, Idaho, a few towns in Oregon, and even into North Dakota.

Q. What procedure is followed after the film has been liquidated?

A. After the film has been liquidated we submit a list to New York, on the condition of the individual print, and if they have all played out, they tell us we can junk

the prints, or they tell us to ship the prints to another exchange. They have different areas where they store those films for re-issue purposes in later years.

Q. Do you junk them actually, physically, in the State of Utah?

A. No, we do not. We merely discount them, and the rolls are shipped to Eastman Kodak Company, of Rochester, or Burbank, or the laboratories in New York.

Q. In the re-issue, what is the procedure? Do you retain the film itself here in Utah?

A. What do you mean?

Q. You mentioned some films are retained for re-issue. Where is that done?

A. They tell us to ship certain prints to a certain area like, for instance, to Milwaukee, if they have the proper storage facilities there. When we are through with the print we ship it to that office. Maybe later on we get the print back again, after three or four or five years.

Q. On the return of a re-issue print, does that come on [fol. 66] the reel for exhibition or in the same form you originally had it?

A. They ordinarily come in rolls in tin cans and a pasteboard box.

Q. Do you customarily store film here in Utah for re-issue?

A. We do not.

Q. Do you have some exception to that custom?

A. We have had one exception in the past years that I have been with Fox. That was on Brigham Young. That picture was released in July, 1940. The picture was junked nationally in about 1943. I retained our prints for the 1947 Jubilee Centennial.

Q. You still have those prints?

A. We still have those prints.

Q. Do you recall how many prints came into your area for the initial showing of Brigham Young?

The Court: How is that material?

Mr. Pugsley: I believe it shows the degree of control from the East.

The Court: It sounds to me like the control was in the West on that one. These people retained it here, because of

a local situation. They retained it for the Centennial. They said, "We would like to keep this," and New York said, "All right."

That is one picture. What we are trying to get at is, what is the general business practice?

You are not going to contend, are you, Mr. Pugsley, that we have to look at each one of these films that comes here, and the circumstances surrounding it, to determine whether the carrier of that particular film is within or without interstate commerce?

Mr. Pugsley: No, I believe it is the general field of operation.

The Court: Yes. As a matter of fact, the carrier may be carrying different ones.

Mr. McMahon said the theory of the thing, with the Roy Rogers picture, was that it is sometimes sold before it is manufactured.

Mr. Windward and the other gentleman, Mr. Wade, said that newsreels are sold before they are manufactured.

[fol. 67] Well now, suppose you have Mr. Wycoff going down Highway 91 with three rolls of motion picture film in his truck, one a newsreel and one a Roy Rogers or a serial and a third one of these big feature pictures, which not only has not been sold before it was produced, but it was not sold, as Mr. Walker said, until after they had a showing and invited the trade in to see it.

Now, what is the nature of that transportation? Is it intrastate or is it interstate? Are you going to take the position, because of the newsreel or the short subject picture, that Wycoff can't be regulated by the different regulatory commissions of the State of Utah?

Mr. Pugsley: It is our position that the newsreel, the short and the features are all interstate in character.

The Court: Your contention is that everything is interstate?

Mr. Pugsley: That is right.

The Court: On the basis of the evidence that has been coming in, what do you rely on?

Mr. Pugsley: We rely on the fact there is continued control outside the State of Utah for presentation of this product and return of the product. It is not merely for

consumption in Utah. There is no resale, no change of ownership at all.

The Court: Do you have any authority for that?

Mr. Pugsley: Yes, I think we have quite a few authorities.

The Court: Give me one.

Mr. Pugsley: First is a decision from the case that is summarized very nicely in the Rush case, by the Interstate Commerce Commission.

The Court: That is what case—what is the name of that?

Mr. Pugsley: Rush Motor Carrier application. It is 17 motor carrier cases, page 661.

The Court: When was that decided? But, I am not bound by any decision of the Interstate Commerce Commission.

Mr. Pugsley: That is correct. That is not conclusive.

[fol. 68] The Court: Have you any authority that would be binding on this Court?

Mr. Pugsley: The Republic Pictures Corporation versus Kappler Brothers—151 Federal 2nd, 543.

The Court: What circuit is that in?

Mr. Pugsley: I think that is Iowa.

The Court: That is not binding on this Court.

Mr. Pugsley: It was affirmed by the Supreme Court of the United States.

The Court: Did the Supreme Court write an opinion?

Mr. Pugsley: No, it was affirmed, and after that, rehearing was denied.

The Court: What you are saying there is that certiorari was denied.

Mr. Pugsley: The certiorari was not denied. The rehearing was denied. It was affirmed.

The Court: Affirmed without an opinion?

Mr. Pugsley: That is as I recall, your Honor.

The Court: What else do you have?

Mr. Pugsley: A federal case, 167 Federal 2d, 700.

The Court: Is that the Tenth Circuit?

Mr. Pugsley: No, I think that is the Seventh Circuit.

The Court: All right.

Mr. Pugsley: We do not have a Tenth Circuit decision. We have a United States Supreme Court decision.

The Court: Are those Supreme Court decisions in point?

Mr. Pugsley: We believe they are. They discuss the nature of transportation of films, the method of handling them, the method of the industry's treatment of the film, the continued control of the same, and the fact that it is interstate in character. That, of course, we think is the issue here.

The Court: Well, now, here these people run a local business.

[fol. 69] Mr. Pugsley: A branch, your Honor.

The Court: Yes, but it is a local business.

The Witness: They are not producers, they are distributors. As a matter of fact, the distributing corporation is separate in most of these motion picture concerns from the producers' corporation.

The Court: Is that true of Twentieth Century-Fox?

The Witness: No.

The Court: The producer also distributes?

The Witness: That is correct.

The Court: Well, it is true of Paramount. Paramount has a producers' corporation and a separate distributing corporation. As a matter of fact, they get down to several affiliated corporations that own local theatres. That is true of Paramount, and Fox, too, isn't it?

The Witness: Yes.

The Court: I have some other cases pending in this court, involving that.

Now, the film comes in here and is booked by the local agency and sent out to the theatres, and the theatres use it up. After a while it has deteriorated to a point where it is not usable any more, so they box the thing up and send it to the Eastman Kodak Company for some purpose or another, or they send it down to Burbank, California, or send it back to New Jersey or New York. It is taken out of distribution. The product is used up, in other words. Where was it used up? It was used up right here in the state of Utah.

Mr. Pugsley: We contend it did not come to rest at any time in Utah. It was not consumed. But each one of these exchanges encompass more than the state of Utah. So the movement in the state of Utah to another point in the state of Utah is still a part of the initial intention of the shipper, to keep it moving around, and keep it circulating. It may

come to rest for a time, but it is not limited to consumption in Utah.

The Court: You may go ahead with your examination.

[fol. 70] By Mr. Pugsley:

Q. Is it your custom in the operation of your exchange to notify the New York or San Francisco office of bookings on film?

A. Only on a first run basis in Salt Lake City, Butte and Great Falls and so forth.

Q. I believe you stated that the contract that has been referred to as Exhibit No. 3, that form is sent back to the home office?

A. That is right.

Q. What do they do with those contracts after signing by them?

A. They return us the office copy and the exhibitor's copy. We, in turn, send the exhibitor's copy direct to him.

Q. Do you handle the distribution of film by the armed services?

A. I can't say definitely whether we are right now. We have in the past. You mean the subjects that were made by the army?

Q. Yes.

A. We have handled those.

Q. Are those handled in the state of Utah in a different method than you designated as to the feature film and shorts?

A. The bookings of those government shorts is controlled by the Army Motion Picture Service, with a branch at the present time in San Francisco.

Q. You do not handle those at the present time?

A. No.

Q. Do you handle the distribution of this advertising, Mr. Walker?

A. No, we do not.

Q. By whom is that handled?

A. The National Screen Service.

Mr. Pugsley: We have nothing further at this time.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Walker, as a general business practice the film, when it comes in here, the prints when they arrive from outside the state arrive not on finished rolls, but probably in thousand foot bundles or rolls and do not have any heads or tails on them, but are not fixed in such a way they could be put on projecting machines?

A. That is correct, except the film that we borrow from other exchanges.

Q. That is the exception?

A. That is right.

Q. In other words, none of these prints when they arrive here from out of the state could go on to the theatres in Utah for exhibition without being handled here and checked, and heads and tails placed on them, placed on the rolls?

A. There would be one exception. That would be a news [fol. 71] reel. Sometimes the news reel is shipped direct to the theatre.

Q. That is an exception?

A. Yes.

Q. What is your general business practice with regard to determination of bookings and playing theatres after your contract has been signed?

A. The contract usually carries that prov-sion as to the number of days, preferred time.

Q. Yes?

A. That is a part of the contract.

Q. Just the number of days?

A. The number of days, the date or the week.

Q. Are the exact dates determined?

A. Not as a general rule.

Q. Isn't it a fact that as a matter of general procedure not until the film arrives in Salt Lake are these booking dates set with the theatres in Utah?

A. That is correct.

Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?

A. It is between the exhibitor and the carrier.

Q. And the exhibitor pays the charge?
A. They designate how they are to ship.

The Court: Any further examination?
Mr. Worsley: We have nothing.
Mr. Pugsley: We have nothing further.
The Court: Step down. Do you desire to excuse this witness?
Mr. Pugsley: We have nothing further.
The Court: Do you desire to excuse him?
Mr. Ferguson: We will excuse him.
The Court: You may be excused, Mr. Walker.

(Discussion with respect to next witness.)

STIPULATION RE TESTIMONY OF DON TIBBS

The Court: Who is your next witness?
Mr. Pugsley: Don Tibbs.
The Court: Can you stipulate?
Mr. Pugsley: We can stipulate his testimony would be the same as Mr. Tom McMahon. He is also one of those low budget picture distributors.
[fol. 72] The Court: Whom does he represent?
Mr. Ferguson: Republic.
Mr. Pugsley: No, he represents Monogram.
The Court: Monogram?
Mr. Pugsley: Yes.
The Court: Well, what you are going to have him testify to is that he produced the serials or westerns for some of these low budget pictures, that the producer contracts with the theatre owner or exhibitor to sell him those pictures even before they are produced or are in the state of Utah. Is that what you have in mind?
Mr. Pugsley: That is correct.
The Court: Do you people want to stipulate that is what the man would testify to if he were called?
Mr. Worsley: Yes, we will so stipulate. He could testify to the lease of the rolls, but not the showing.
Mr. Ferguson: That is right.
The Court: I asked him about that, and Mr. McMahon's testimony was that they tried, with their production sched-

ule, to meet in a general way the time for the exhibition, but it was not tied down to any particular date. Now, I suppose your man will testify to about the same thing.

Mr. Pugsley: Yes, Mr. Gibbs would so testify.

The Court: All right. Then is there anything else you want him for?

Mr. Pugsley: No, that is the only testimony.

The Court: Then you can dispense with him.

Mr. Pugsley: Yes.

The Court: Have you any other witnesses you desire to call, Mr. Pugsley?

Mr. Pugsley: No. But we would like, before resting, as to the intervenor, Mr. Hill, it is stipulated he has applied for and received from the Interstate Commerce Commission authority to transport motion picture film within the state of Utah, to points and places within the state of Utah.

[fol. 73] Mr. Hanson: That is not material.

The Court: I can't see the materiality for that. What do you claim for it?

Mr. Pugsley: As a part of their answer they denied that they have that authority, and allege affirmatively that they would be prejudiced by the decision in this case if they are not permitted to intervene showing their authority.

The Court: Suppose the Interstate Commerce Commission has given a certificate of convenience and necessity to Mr. Hill to transport the motion picture film in the state of Utah?

Mr. Hanson: If it has been done—.

The Court: Well, suppose it has been done. That is immaterial. We are here to determine the nature of this, and whether the Interstate Commerce Commission has or has not issued a certificate has no bearing on that. It is immaterial what the Interstate Commerce Commission has done or what the Interstate Commerce Commission thinks about the particular thing. What the Interstate Commerce Commission has done is not material.

Mr. Pugsley: He has applied to the Interstate Commerce Commission for authority to transport motion picture film.

The Court: That would show what he thinks. That is immaterial in the first place, because that is the very issue that this court is going to decide. And what you are ask-

ing me now to do is to let you put in evidence that the Interstate Commerce Commission thinks I ought to decide that it is interstate commerce, and you want to put in evidence that Mr. Hill thinks I ought to decide it is interstate commerce. I can't permit you to do that.

Mr. Pugsley: We have nothing further. We will rest.

Mr. Ferguson: We will submit it.

The Court: You have no evidence?

Mr. Ferguson: We have evidence, but I think most of it is repetitious.

Mr. Worsley: The court has the picture.

The Court: Well, this is your lawsuit. If you gentle- [fol. 74] men desire to rest, and you have nothing you want to add to this picture—.

Mr. Worsley: May we take a moment? We have not had an opportunity to discuss this. Do you want to give us three or four minutes?

Mr. Hanson: If we may have two or three minutes, your Honor?

The Court: The court will recess for two or three minutes.

(Recess.)

(Recess to two o'clock p. m.)

COLLOQUY

(Argument and further citation of authorities; 17 motor carrier cases, also the Rush Motor Carrier application.)

The Court: In the Rush case, that involved shipments of ore and ore concentrates that were loaded at a mine in the state of Idaho, by motor carrier, a truck, pursuant to a contract with a mining company, and that truck line carried the ore to a railroad station. There they put the ore into rail cars for a movement which was exclusively destined out of the state. Now, how could you say that would apply here?

Mr. Durham: When this product left New York City it was indicated that it would go to distributors outside Salt Lake City as well as in the city.

The Court: In the Rush case the intention was to send it right out of the state. Now, in our case here, these cans of motion picture film come into this state. They are destined for use in this state.

Mr. Durham: All of the other states.

The Court: Not the ones that come in here, necessarily. Maybe some of those that come in here will be sent out beyond, to a circuit that involves Idaho, Montana or Wyoming. But those films, when they come in here, are destined for use in this state. They are sent not for the theatre, but they are sent to a film exchange, to a distributor on East First South. When he gets the film it is not in shape for exhibition. He has to take it out of the container in which it has been shipped. It comes in, in a container that contains [fol. 75] only one thousand feet of reel.

So he takes it out of that. He runs it on a motion picture machine. He fits them together. He gets two thousand feet of film put together. And then he attaches the proper headings for it. The headings—if it is M. G. M., he puts that writing on it. Or if it is Republic, he shows something about Republic—different headings of that kind.

Then he prepares the strip of film so it will fit into the machine, and at the end he has another strip.

After servicing that film in that fashion he runs it onto a reel, which is the reel that it goes out on. Then he puts that in the vault.

When they are ready to send them out to one of the theatres he calls up a carrier and the carrier hauls it down there, and the theatre owner pays the carriage charges on it.

When the theatre owner is through with it, he calls up a carrier, and the carrier picks it up, and the theatre owner pays the carriage charges again, and it goes back to the film exchange, or in some cases it is moved from one theatre to the next one.

Sometimes the circuit is entirely in the state of Utah, sometimes across the state line. When you cross the state line you get into interstate commerce on that shipment. But I very seriously doubt that you have a transportation within the state of Utah that is interstate in character, between Film Row and a theatre in Utah, or between the theatre in Utah and back to Film Row, or between theatres on a circuit entirely within the state. I don't believe that shipment is interstate in character merely because the producers of this film in Hollywood or New York or New Jersey are producing films to be shipped all over the United States.

I think the motion picture production business is interstate in character. I think the motion picture distribution business is interstate in character. But we are not concerned with that. What we are concerned with is whether this transportation between two points, wholly within the state of Utah, is interstate in character, because of the nature of the motion picture film leasing rather than sale, and because of the control to the extent the evidence may show, [fol. 76] that New York has over the leasing and distribution and so forth of that film out here.

I don't think it is interstate in character. I think it is largely a question of fact, with some legal implications in it.

And unless you have something that you think will be persuasive to the court, I am disposed to decide it that way.

Mr. Durham: I believe we have presented our case as well as we know how.

The Court: These facts are very, very important in cases of this kind. They are factual questions very largely.

Well, Mr. Ferguson and Mr. Hanson and Mr. Worsley, if you gentlemen will prepare findings, judgment in the case will be for the defendants Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, and Intervenors Melva Seamons, Roy Hill and Joseph J. Milne Truck Lines, Incorporated.

(Reporter's Certificate omitted in printing.)

Here follow 4 Photolithographs, side folios 77-78, 79-80, 81-82, 83-84

(82A)

Home Office Copy

EXCHANGE _____

THEATRE _____

TOWN AND STATE _____

CONTRACT NO. _____

SALESMAN _____

SALES CONTROL PAGE NO. _____ LINE NO. _____

REPUBLIC PICTURES

SCHEDULE

PLAINTIFF'S EXHIBIT No. 1

FOR THE LICENSE TO EXHIBIT EACH OF THE FOLLOWING MOTION PICTURES, THE EXHIBITOR SHALL PAY TO THE DISTRIBUTOR THE FOLLOWING RENTAL:

NO. AND DESCRIPTION OF PICTURES LICENSED	Consecutive Days Run	GUARANTEED LICENSE FEE (PER PICTURE)		DISTRIBUTOR'S SHARE OF ADMISSION OR BOX-OFFICE RECEIPTS PER PICTURE	SPECIAL TERMS

RUN – CLEARANCE – ADDITIONAL PROVISIONS

RELEASE YEAR OF PRODUCT LICENSED

LICENSE AGREEMENT

AGREEMENT of license under copyright between Republic Pictures Corporation, a New York corporation, (hereinafter named and referred to as the Distributor), party of the first part, and the Exhibitor (hereinafter named and referred to as the Exhibitor) operating the theatre or theatres hereinafter designated, party of the second part.

WITNESSETH: The parties hereto agree as follows:

LICENSE — FIRST: The Distributor grants the Exhibitor, and the Exhibitor accepts, a limited license under the respective copyrights of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, to exhibit publicly said motion pictures and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm film, at the said theatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates herein provided for — only, and for no other use or purpose; provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and good quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theatres unless otherwise in the Schedule specifically provided.

TERM AND WARRANTY — SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof, to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be excluded, as provided in Clauses FOURTEENTH and FIFTEENTH hereunder.

DAMAGES — FAILURE TO DELIVER OR EXHIBIT, ETC. — (b) If the Distributor shall default in the delivery or the Exhibitor shall default in the exhibition of any of said motion pictures which the Distributor is required to deliver or the Exhibitor to exhibit hereunder, or if the Distributor shall willfully violate any of the provisions of Clause Sixth hereof or shall deliver to the Exhibitor a print of any motion picture which print shall not be in condition for exhibition and for the reproduction of sound as provided in Clause Second (a), the Exhibitor or the Distributor, as the case may be, shall pay the damage so caused, in no event to exceed the fixed sum herein specified as the rental for each such motion picture, or a sum computed as provided in Clause Third (c) hereof if the rental of any such motion picture is to be determined either in whole or in part upon a percentage of the admission receipts of said theatre or any part thereof or upon a percentage of such receipts and a fixed sum; provided that any claim by the Exhibitor with respect to the condition of a print shall be deemed to have been waived by the Exhibitor unless notice of such claim shall have been given by the Exhibitor to the Distributor's exchange from which the Exhibitor is served, by telephone or telegraph, or in person, before or immediately after the first public exhibition thereof by the Exhibitor and written confirmation thereof mailed by the Exhibitor upon the same day to the Distributor's said exchange. The Distributor shall not be in default hereunder, unless promptly after the Exhibitor has knowledge thereof, the Exhibitor shall notify the Distributor thereof in writing, and the Distributor shall fail to cure, remedy or remove same within a reasonable time thereafter. The Exhibitor hereby waives any right which it may have to specific performance hereunder.

PAYMENT — THIRD: (a) Exhibitor agrees to pay, as a license fee with respect to each motion picture, the fixed sum, if any, specified in the Schedule, at least three (3) days in advance of the date of delivery or within three (3) days after date of mailing notice to the Exhibitor of tender of delivery of a print thereof at the Distributor's exchange or within three (3) days after the date of shipment thereof to the Exhibitor from another exhibitor, unless after the acceptance of this application by the Distributor, the time of such payment shall be otherwise agreed to by the Distributor in writing signed by an officer of the Distributor. All payments hereunder shall be made to the Distributor at the City in which is located the exchange from which the Exhibitor is served.

PERCENTAGE BOOKINGS — (b) If the rental of any of such motion pictures is to be determined either in whole or in part upon the admission or box-office receipts of said theatre or any part thereof, the Exhibitor agrees to pay such rental immediately after the last exhibition upon the last date of the exhibition of each such picture, or if requested by the Distributor, at the end of each day's exhibition. In each such case the Exhibitor shall deliver to the Distributor immediately after the last exhibition upon each date of exhibition of each such motion picture a correct itemized statement of the gross receipts of said theatre for admission thereto upon each such date. Such statement shall be signed by the Exhibitor or the Manager or Treasurer of said theatre and the Cashier thereof and shall include a statement of such facts and figures as the Distributor may require to be furnished by the Exhibitor, and if requested by the Distributor, shall be made upon forms furnished by the Distributor. Upon the exhibition date or dates of each motion picture licensed hereunder, any person or persons authorized by the Distributor so to do are hereby given the right to observe, check and verify the sale of all tickets of admission to said theatre and the receipts therefrom and the number of persons entering such theatre on such date or dates, and to have access to all parts of said theatre including the box-office and to examine all ticket machines, or other mechanical devices, tickets and stubs at said theatre on said date or dates, and to be allowed to exercise the aforesaid rights, or any of them, from any position or positions in or about said theatre to enable such person or persons to see and count each person entering said theatre and to use a tally register or registers or any other device which he or they may desire to use in the exercise of such rights, and the Exhibitor agrees not to cause, permit or suffer any interference with such person or persons in the exercise of such rights. On such exhibition date or dates or at any time and from time to time thereafter, after as well as before the expiration of the term of this agreement, any person or persons authorized by the Distributor so to do shall have the right to examine and make extracts from or copies of all entries in all books, records and files of the Exhibitor relating to such sale of tickets and admission receipts on such date or dates, and if it is hereunder provided that the Exhibitor may make certain expenditures or deductions, such authorized persons, or any of them, shall have the right to examine and make extracts from and copies of all entries relating to such expenditures and/or deductions.

ADMISSIONS OTHER THAN AT REGULAR RATES — PERCENTAGE BOOKINGS — (c): If the rental provided herein for any picture licensed hereunder shall be determined in whole or in part by the admission or box-office receipts, or any part thereof, the Exhibitor shall not admit to the theatre at which such picture shall be exhibited, on any date on which such picture is exhibited thereat, more than 25 persons without payment of any admission price or at admission prices less than the regular admission price prevailing at said theatre. The Exhibitor shall, without prejudice to Distributor's other rights and remedies hereunder, be accountable for, and shall pay to Distributor the latter's share of, the regular admission price prevailing at said theatre with respect to each person in excess of said number admitted to said theatre on each such date, with the same force and effect as though the Exhibitor had collected such admission price from each such person.

LIQUIDATED DAMAGES — PERCENTAGE BOOKINGS — (d) If the Exhibitor fails or refuses to exhibit any of said motion pictures as herein provided and the rental or any part thereof is to be computed in whole or in part upon a percentage of the admission or box-office receipts of said theatre, the Exhibitor shall pay the Distributor as liquidated damages for each day the Exhibitor fails or refuses to exhibit any such motion picture, in addition to any fixed sums payable hereunder in respect of such motion picture, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by the Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said picture should have been so exhibited hereunder, or if no feature motion picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates of such failure or refusal to exhibit; provided that if the exhibitor shall exhibit any such motion picture for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

LOSS AND DAMAGE TO PRINTS — FOURTH: The Exhibitor shall pay the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any print lost, stolen or destroyed or injured in any way in the interval between the delivery to and the return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor and delivery thereof was made as hereunder provided. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition, it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, before or immediately after the first public exhibition thereof, shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

SELECTION OF PLAY-DATES — FIFTH: Unless otherwise agreed upon or unless definitely specified or otherwise provided for in the Schedule, the exhibition date or dates of each of said motion pictures shall be determined as follows:

1. Subject to prior runs and/or clearance granted or hereafter granted by the Distributor to other exhibitors and within a reasonable time after a print or prints of any of said motion pictures are received at the exchange of the Distributor out of which the Exhibitor is served, and provided the Exhibitor is not in default hereunder or under any other exhibition contract heretofore or hereafter executed between the parties hereto, the Distributor shall mail to the Exhibitor a notice in writing of the date when each such motion picture will be available for exhibition by the Exhibitor (which date is hereinafter referred to as the "available date"). Such notice shall be mailed to the Exhibitor at least fifteen (15) days before the available date therein specified.
2. Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates not theretofore assigned to another exhibitor or other exhibitors within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.
3. Upon the failure of the Exhibitor to so select such date or dates the Distributor may designate such date or dates by mailing written notice thereof to the Exhibitor.

CLEARANCE AND RUN — SIXTH: If (but only if) a "run" is separately stated on the Schedule to be granted exclusively to the Distributor, the Distributor agrees not to exhibit or grant a license to exhibit any motion picture licensed hereunder for exhibition on the same "run" or prior to the expiration of the "clearance period," if any, in the Schedule specified at any theatre named therein or within the territorial limits specified in the Schedule. Such period of clearance as to each such motion picture shall be computed from the last date the exhibition thereof licensed hereunder. If the clearance granted hereunder shall be determined to be unreasonable as to time or area by any decision, judgment, order or decree in any judicial or arbitration proceeding, then same may, upon written notice by Distributor to Exhibitor, be reduced, as to licensed pictures thereafter exhibited hereunder, to the period and area as shall be in conformity with such decision, judgment, order or decree without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement. If it shall be established by any decision, judgment, order or decree in any judicial or arbitration proceeding that any other theatre or exhibitor is entitled to the same run as is hereunder granted to Exhibitor, or a run similar thereto or in conflict therewith, Distributor may grant to such other exhibitor or theatre the run to which it may be entitled under such decision, judgment, order or decree, without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement — If the license granted herein is subject to any prior run, any booking by the Exhibitor of a picture licensed hereunder, or confirmation of such booking by the Distributor, is subject to change by the Distributor at any time prior to exhibition of such picture by the Exhibitor, in order to permit such prior run.

DESCRIPTION OF PICTURES — SEVENTH: (a) The Distributor, or the producer of any of the motion pictures licensed herein, shall have and hereby reserves the right, in the sole discretion of the Distributor, or the producer thereof, at any time, to change the title of any of such motion pictures, to make changes in, alterations and adaptations of any story, book or play of or in connection with any such motion pictures, and to substitute for any thereof any other story, book or play. The Distributor, or the producer thereof, shall have and hereby reserves the right to change the director, the cast, or any member thereof, of any said motion pictures.

(b) The Exhibitor shall not be required to accept for any feature motion picture expressly described in the Schedule as that of a named star, director, author, book or play, any motion picture of any other star, director, author, book or play, nor to accept any other feature motion picture in place of any thereof which in the Schedule is designated "no substitute." The right of rejection conferred on the Exhibitor by this Clause is in addition to the right of exclusion provided in Clause Fifteenth hereof.

(c) The Distributor warrants that none of said motion pictures are reissues or re-releases of old negatives, or old negatives retitled, excepting those expressly specified as re-releases in the Schedule.

FORD, FELDMAN, MILESTONE, WELLES, WAYNE, ROGERS, COLOR, ETC. PICTURES — EIGHTH: Anything herein to the contrary notwithstanding, the picture or pictures licensed hereunder shall not include any "color" picture or any picture or pictures not produced by the Distributor or any of its subsidiaries, or any picture or pictures of or in which John Ford, Chas. K. Feldman, Lewis Milestone, Orson Welles, John Wayne or Roy Rogers is or shall be a producer and/or director and/or actor, or any other picture or pictures generally licensed for exhibition by the Distributor pursuant to separate contracts which identify or describe such picture or pictures, in whole or in part, by the name of a producer, director or actor, unless specifically and expressly

Form E9162—125M Sets—25 Sets of 6 to a Pad 1-50 (C)

PLAINTIFF'S EXHIBIT No. 3

(82C)

Printed in U. S. A.

TWENTIETH CENTURY-FOX FILM CORPORATION

FEATURE PRODUCTIONS

EXECUTIVE OFFICES
444 WEST 56th ST.
NEW YORK 19, N. Y.

Zone No._____

Page Two

BRANCH APPROVED COPY

SCHEDULE

✓ PLAINTIFF'S EXHIBIT No. 3

EXCHANGE_____ DATE_____ SALESMAN_____

THEATRE	CODE	EXHIBITOR	LOCATION OF THEATRE

PROD. NO.	TITLE OF PICTURES	CONSECUTIVE NO. OF DAYS AND SPECIFIC DAYS OF WEEK, BOTH INCLUSIVE	MINIMUM GUARANTEED LICENSE FEE	DISTRIBUTOR'S SHARE OF GROSS RECEIPTS	GROSS RECEIPTS IN EXCESS OF WHICH DISTRIBUTOR'S SHARE IS 50%
			$	%	$

RUN_____

CLEARANCE_____

(END OF SCHEDULE)

(Continued from reverse side)

13. TAXES—Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the pictures or upon the grant of this license or the exercise thereof or based upon or measured by the license fees or any part thereof, however determined, [illegible] shall be deemed to include but shall not [illegible] to taxes, fees, assessments, charges, imposts,

LICENSE AGREEMENT

(P. 82D)

AGREEMENT made between **TWENTIETH CENTURY-FOX FILM CORPORATION**, hereinafter referred to as Distributor, and the Exhibitor named in the Schedule.

WITNESSETH: The parties hereto agree as follows:

1. **LICENSE**—The Distributor grants to the Exhibitor and the Exhibitor accepts a limited license under the respective copyrights of the motion pictures designated in the Schedule hereof (such motion pictures being herein referred to as "pictures") and under the copyright of any matter included in any sound recorded therewith to exhibit publicly said pictures and to reproduce for public performances such recorded sound in synchronism therewith at only the particular theatre herein licensed for the number of consecutive and particular days of the week all as specified in the Schedule and for no other use or purpose. If copyrighted musical compositions are included in such recorded sound, the Exhibitor shall have at the dates of the exhibition of each picture a license from the copyright proprietor thereof or from the licensee of such copyright proprietor to perform publicly the copyrighted musical compositions. Distributor reserves the right to license the pictures or adaptations thereof, in whole or in part for theatrical, radio or other uses, and Distributor's grant of such rights shall not be construed to be competitive to the license granted to Exhibitor hereunder.

2. (a) **DELIVERY OF PRINTS AND WARRANTY**—After each picture is generally released for public exhibition in the exchange area in which the Exhibitor's theatre is located and becomes available for exhibition by the Exhibitor (as hereinafter provided) Distributor shall deliver to the Exhibitor for exhibition at said theatre for the number of days provided in the Schedule, upon the date or dates determined as herein provided, a positive print of such picture in good condition for use.

(b) **DAMAGES—FAILURE TO DELIVER**—If the Distributor shall fail or refuse to deliver any of said pictures, as herein provided, Distributor shall pay a sum equal to the damage so caused, but not to exceed the license fee payable hereunder as to any such picture. If such damage cannot be definitely computed Distributor shall pay as liquidated damages a sum equal to the fixed rental of such licensed picture, or if the rental of such licensed picture is to be determined either in whole or in part upon a percentage of the admission receipts of said theatre a sum computed as provided in paragraph 4(b) hereof. The Distributor shall not be liable to damages in excess of the sum which would represent liquidated damages as herein provided. Any claim by the Exhibitor with respect to the condition of a print is hereby waived unless notice of such claim shall have been given by the Exhibitor to the Distributor at the exchange from which the Exhibitor is served by telephone, telegraph or in person immediately after the first public exhibition thereof by the Exhibitor and written confirmation thereof given by the Exhibitor to the Distributor the same day at its said exchange by United States mail.

3. **EXHIBITION AND PAYMENT**—The Exhibitor shall exhibit each of said pictures at the said theatre for the number of and the particular days provided in the Schedule upon the date or dates determined in paragraph 7 hereof, and in the order of general release by the Distributor in the exchange territory in which said theatre is located. The Exhibitor shall pay for such license as to each picture: (a) All fixed sums or guaranteed sums at least three (3) days in advance of the date of delivery of a print thereof at the Distributor's exchange or of the date of shipment to the Exhibitor from another exhibitor; or (b) Rentals determined in whole or in part by a percentage of the admission receipts of said theatre immediately after the last exhibition licensed hereunder of each such picture, or if requested by the Distributor at the end of each day's exhibition. On all such percentage engagements Exhibitor shall deliver to the Distributor immediately after the last exhibition of each picture a correct, itemized, sworn statement of the gross receipts of said theatre for admission thereto for each day during the exhibition period of each picture for which payment is so required to be made. "Gross Receipts" shall not be less than a figure determined by multiplying the number of persons admitted (less a reasonable number of free admissions) by the quoted admission prices; and if admission prices have been advertised, the quoted prices, for the purpose of this computation, shall be the advertised prices, otherwise, they shall be those posted at the Box Office. The Exhibitor shall also furnish immediately after the conclusion of the engagement of such picture a recapitulating statement and together therewith pay to the Distributor any payment due in connection with such engagement. All such statements shall show the number of admissions at the respective admission prices charged at each performance and the number of free admissions and shall be signed by Exhibitor's manager, treasurer or cashier. Such itemized statements shall be made on forms furnished by the Distributor, if so requested by the Distributor. The acceptance by the Distributor of any statements or any sum tendered by the Exhibitor in full payment of any license fee payable hereunder shall be without prejudice to any of the Distributor's rights and remedies and shall not prevent the Distributor from thereafter disputing the accuracy of such statement or payment. At all times during the exhibition of any picture licensed hereunder Distributor is given the right to have its authorized representatives at said theatre to check the sale of tickets to and persons entering the theatre and all receipts therefrom. Such representatives shall for such purpose have free access to all parts of the theatre and the theatre premises, including the box office and the right to examine any and all ticket machines or devices, tickets and stubs, and all entries in all of Exhibitor's books and records pertaining to gross receipts of any picture hereunder exhibited at said theatre. Distributor is also given the right to audit all of Exhibitor's books and records at any time after the conclusion of the engagement of any such picture, and for such purpose Distributor by its authorized representatives shall be given access to the theatre, including the box office and other places where such books and records are kept. Exhibitor's books and records shall show, among other items, the number of and different prices of admissions and gross receipts at each separate performance during the engagement of such picture, matinee, evening or other performances. If Exhibitor's operating expense is a factor in the computation of the amount payable to the Distributor, the Distributor is granted the further right to audit all the Exhibitor's books and records relating to the Exhibitor's operating expenses. In computing Exhibitor's operating expenses any and all income other than paid admissions to the theatre during the period of the engagement of any picture on a participating basis shall be deducted from Exhibitor's operating expenses. Any information obtained pursuant to the provisions of this paragraph will be treated as confidential except in any arbitration proceedings or litigation with respect to this agreement.

All payments hereunder shall be made to the Distributor at the exchange from which the Exhibitor is served.

4. **DAMAGES—FAILURE TO EXHIBIT**—If the Exhibitor fails or refuses to exhibit any of said licensed pictures as herein provided, the Exhibitor shall pay to the Distributor as liquidated damages: (a) as to any such picture the rental for which is a fixed amount, such fixed amount specified in the Schedule, or (b) as to any such picture as to which the rental or any part thereof, is to be determined, either in whole or in part, by a percentage of the admission receipts of said theatre during the exhibition of such picture, for each day the Exhibitor fails or refuses to exhibit the same, a sum equal to the herein specified percentage of the average of the daily gross receipts of such theatre on all days on which feature motion pictures distributed by the Distributor licensed on a percentage of the admission receipts were exhibited thereat during the period of ninety (90) days prior to the date or dates when such picture should have been so exhibited, or if no such feature picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to the herein specified percentage of the average of the daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such picture should have been exhibited. If the Exhibitor shall exhibit such picture for less than the full number of days specified in the Schedule, for each day less than said full number of days, the Exhibitor shall pay a sum equal to the herein specified percentage of sixty-five per cent (65%) of the gross receipts of said theatre during the last day of the exhibition thereat of such picture. In any event the Distributor shall be entitled to receive an amount equal to the fixed sum, if any, specified as the minimum rental therefor.

If the Exhibitor shall fail or refuse to exhibit or pay for any one or more of the pictures, Distributor may, at its option, declare such failure or refusal a breach of this entire contract and all other unperformed contracts between Distributor and Exhibitor and recover from Exhibitor as damages therefor, the amount payable as license fees in respect of all pictures not exhibited and paid for, computed pursuant to the provisions of this paragraph 4.

5. **DELIVERY AND RETURN**—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the Exhibitor or to the Exhibitor's authorized agent, or to a common carrier designated by the Exhibitor, or to the United States Postal authorities as agent for the Exhibitor. Exhibitor shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same.

(b) The Exhibitor shall return immediately after the last exhibition licensed hereunder, each print received hereunder, with its reels and containers to the exchange of the Distributor from which the Exhibitor is served, or as directed by the Distributor, in the same condition as when received, reasonable wear and tear due to proper use excepted. The Exhibitor shall pay all costs of transportation in returning said print, but if directed by the Distributor to ship such print elsewhere than to the Distributor's exchange, it may send the same transportation charges collect.

(c) If Exhibitor fails to or delays the return of any print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor, it shall pay the Distributor a sum equal to the damage, if any, so caused the Distributor and, in addition, the damage, if any, so caused such other exhibitor.

6. **LOSS AND DAMAGE TO PRINTS**—The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange of each linear foot of any print, lost, stolen, destroyed or injured in any way in the interval between the delivery to and return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within thirty (30) days after the date when the same should have been returned hereunder. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent Exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, immediately after the first

[fols. 85-86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER SUBSTITUTING PARTY APPELLEE—August 27th, 1951

On application of appellant, and pursuant to stipulation of the parties, it is now here ordered that the time for the serving and filing of appellant's brief be and the same is hereby extended to and including September 10, 1951. It is further ordered that Stewart M. Hansen be and he is hereby substituted for and in the place and stead of Donald Hacking as a party appellee in this cause.

Argument and submission—November 9, 1951 (omitted in printing).

IN UNITED STATES COURT OF APPEALS

OPINION—December 19, 1951

Harold S. Shertz (Wayne C. Durham was with him on the brief) for Appellant; C. W. Ferguson for Appelees.

Before Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges.

HUXMAN, Circuit Judge:

Wycoff Company, Inc., is a Utah corporation engaged in the transportation of property as a common carrier by motor vehicle. Its business consists of transporting motion picture films and news reels between various picture exchanges in Salt Lake City and between individual exhibi- [fol. 88] tors, both within and without the State of Utah. It holds a certificate of convenience and necessity as to its interstate transportations from the Interstate Commerce Commission, but has refused to acknowledge the jurisdiction of the Public Service Commission of Utah as to its transportation activities beginning and ending wholly within the State of Utah. When the Public Service Com-

mission of Utah sought to exercise jurisdiction over such last named activities, Wycoff brought a declaratory judgment action in the United States District Court for the District of Utah for a judgment declaring that all of its activities were interstate and enjoining the State Commission from interfering with its transportation of motion picture film and news reels over its routes within Utah, as authorized by the Interstate Commerce Commission. The trial court concluded that all transportation of film from the branch distributing offices of distributing companies located in Salt Lake City, Utah, to theatre exhibitors within the State of Utah and transportation of film from one theatre to another within the State was intrastate transportation, subject to the jurisdiction of the State Commission. The court entered an appropriate judgment that the State Commission was not interfering unlawfully with such operations and denied appellant the relief prayed for. The sole question on appeal is whether the intrastate transportations are nonetheless integral parts of interstate transportations.

Most picture films originate in the laboratories of national distributors in New York, New Jersey and Los Angeles. The distributors have set up a system of exchanges in various sections of the country, to which they send all motion picture film for exhibitors in a designated area. Such exchanges are maintained in Salt Lake City, Utah.

All motion picture houses (exhibitors) obtain their films from the national distributors under contract with them. Under such contract an exhibitor may designate the film he desires. He is, however, not entitled to any particular picture at any specified date. The contract is generally executed before a picture is released to the public. It provides that after a picture is released for public exhibition and [fol. 89] becomes available for exhibition by the exhibitors, the distributor agrees to deliver a print of the motion picture to the exhibitor. The film is then sent to the exchange, in this case Salt Lake City, where it is processed and readied for exhibition. In the contract the distributor agrees to make delivery of the film contracted for "to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, *as the Distributor may*

elect." [1] The exhibitor agrees to show the film at the designated date and, at the conclusion of such showing, transport it to the next exhibitor at his expense. Thus in rotation each exhibitor agrees to transport the film at his own expense until it reaches the last exhibitor, who then is obligated to deliver it at his cost back to the exchange, from where it is returned to the distributor for final disposal. No film is sold to the exhibitor. The distributor merely licenses the right to exhibit the film. The title at all times remains in the distributor. The inspection and processing of these films in the exchanges are necessary steps before the films can be reshipped to exhibitors' theatres for showing therein.

The legal principles which guide us in determining whether an intrastate shipment is in fact such or is a continuing part of an interstate shipment are clear and well defined. The difficulty as always comes when we seek to apply them to a given state of facts. As stated by the Supreme Court in United States v. Erie R. Co., 280 U. S. 98, "the nature of the shipment is not dependent upon the question when or to whom the title passes * * *" or whether "the transaction is initiated or completed under a local bill of lading which is wholly intrastate * * *," nor yet "by the fact that there may be a detention before or after the shipment on the local bill of lading." If there is a continuing intent that the goods shall be transported until they reach a designated place, the entire transportation is a continuing one, notwithstanding that there may be a temporary stoppage enroute for a particular purpose.[2] In Walling v. Jacksonville Paper Co., 317 U. S. 564, the Supreme Court [fol. 90] reaffirmed these principles in the following language: "If the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points."

Tested by these principles, we think the judgment must be reversed. The distributor did not lose interest in the con-

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[1] Emphasis supplied.

[2] See Atl. C. L. R. R. v. Standard Oil Co., 275 U. S. 257; and United States v. Erie R. Co., 280 U. S. 98, and cases cited therein.

tinued transportation of a film when it reached the exchange. Under the contract, both it and the exhibitor contemplated and understood that the film should continue in transportation until it reached the exhibitor's theatre. The distributor had a continuing interest in the transportation of the film beyond the exchange. While the distributor agreed to make delivery of the film to the exhibitor "at the exchange, or to a common carrier, or to the United States Postal authorities," it retained the right to select the agency to which delivery should be made, for the purpose of continuing the transportation to the exhibitor's theatre. Elliott S. Windward, Manager of R. K. O. Pictures, Inc., testified that it exercised control over the shipper employed to transport the film from the exchange to the exhibitor. He testified that such a shipper "must have the proper credentials involving insurance and protection of the prints while in his possesson; he must be a licensed carrier, and he must also be approved by the Home Office." As long as this control was exercised over the entire journey, it cannot be said that the film "came to rest" at the exchange, as that term is understood, in order to end interstate transportation. We conclude the parties to these contracts contemplated and obligated themselves to a continuous transportation of the film from the distributor to the various exhibitors and back to the exchange, interrupted only temporarily at the exchange for processing of the film and for allocation to the various exhibitors, and that the entire transportation constituted interstate commerce. This conclusion finds support in Republic Pictures Corporation v. Kappler, 151 F. 2d 543, Beggs v. Kroger Co., 167 F. 2d 700, and Transway, Inc. v. Exhibitors Delivery Service, Inc., 51 M. C. C. 263 (1950), upon facts similar to those before us.

Reversed.

[fols. 91-94] IN UNITED STATES COURT OF APPEALS

JUDGMENT

Twenty-third Day, November Term, Wednesday, December 19th, 1951. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Wycoff Company, Incorporated, a corporation, appellant, have and recover of and from Public Service Commission of Utah, appellee, its costs herein.

By order of December 31, 1951, the time for appellee's petition for rehearing was extended to February 7, 1952.

[fol. 95] IN THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 4293

WYCOFF COMPANY, INCORPORATED, a Corporation, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, Stewart M. Hanson and W. R. McEntire, Appellees,

and

MELVA SEAMONS and ROY HILL, d/b/a SEAMONS TRUCK LINE, and Joseph J. Milne Truck Line, Inc., a Corporation, Intervenors

Appeal from the United States Court for the District of Utah, Central Division

APPELLEES' PETITION FOR REHEARING—Filed February 6, 1952

To the Honorable Judges of the United States Court of Appeals, Tenth Circuit:

The appellees and intervenors herein respectfully petition this Honorable Court to reconsider its decision and judg-[fol. 96] ment entered in the above entitled cause and to grant a rehearing therein for the following reasons:

1. The majority opinion is based upon an apparent misstatement of important and controlling facts, that is, (a) that the contracts of film exhibition are generally executed before the film is released to the public in Utah, or in other words, physically present and available in Utah for booking and distribution; (b) that the contract of exhibition between the film distributor and theatre-exhibitor provides that local transportation of film within Utah shall be made by the carrier selected by the film distributor rather than by the theatre exhibitor; (c) that the majority of films are transported under a continuing circuiting arrangement beginning at out-of-state film laboratories, and thence to the Salt Lake film exchanges, thence to one theatre after another until all theatres have shown the films, thence back to the

Salt Lake City film exchanges, and thence to out-of-state film laboratories for junking without once coming to rest within the State of Utah, and (d) that there is continuous movement of each shipment of film, presumably in the original package, from out-of-state laboratories to a designated theatre in Utah under a common control, management and arrangement for such transportation, when the indisputed facts of the Record relative to the foregoing are to the contrary.

2. That the opinion has misconstrued or misapplied decisions of the United States Supreme Court, other lower federal courts and tribunals, and the legal principles of such decisions as applied to the facts of this case. Furthermore, the opinion decides a federal question in conflict with leading decisions of the United States Supreme Court, as well as other federal Circuit Courts of Appeal.

[fol. 97] Introductory Statement

The appellees, including intervenors, are fully aware of the desire of this Court to avoid the necessity of rehearing wherever possible. It is the earnest and sincere conviction of appellees, however, that the opinion rendered in this case has assumed certain facts which are directly contrary to the Record, failed to consider other facts which have a direct bearing on the decision, and apparently misinterpreted at least two decisions of the United States Supreme Court, as well as those of other lower federal courts and tribunals, and has decided a federal question in direct conflict with leading decisions of the United States Supreme Court.

Moreover, the decision in this case is of the utmost importance, not only because it directly affects the scope of regulatory jurisdiction of a sovereign state heretofore exercised without question for several decades, but also, because the decision will unsettle important and commonly accepted distribution-transportation practices and principles established and followed for many years by shippers, forwarders, distributors and carriers throughout Colorado, Wyoming, New Mexico, Kansas and Oklahoma, as well as the balance of the United States. It will unquestionably divest several hundred certificated intrastate motor car-

RUN – CLEARANCE – ADDITIONAL PROVISIONS

RELEASE YEAR OF PRODUCT LICENSED

The Exhibitor agrees to play and/or pay for not less than _____ features licensed hereunder per _____ commencing _____

_____ westerns licensed hereunder per _____ commencing _____

and _____ chapters of each serial licensed hereunder per week commencing _____ if and as available, in the order of release, until all motion pictures licensed hereunder (other than those excluded from the license hereunder pursuant hereto) are exhibited and/or paid for. It is further agreed that each chapter of each serial shall be played in consecutive order and that immediately following the playing of the last chapter of a serial, the Exhibitor shall play the first and succeeding chapter of the next serial available and licensed hereunder.

RELEASE-DELIVERY AND RETURN OF PRINTS — TWENTY-FIRST: (a) After each of said motion pictures is generally released for public exhibition and becomes available for exhibition hereunder by the Exhibitor, the Distributor agrees to deliver, subject to each and all of the terms, covenants, provisions and conditions hereof, a print thereof to the Exhibitor.

(b) The public exhibition of any of said motion pictures for at least three (3) consecutive days at prices usually charged for admission to the theatre where so exhibited in the territory wherein is located the exchange from which the Exhibitor is served, excepting any "road show," "tryout," "preview," or "pre-release" exhibitions thereof, shall be deemed the general release for public exhibition of such motion picture, but only in such territory.

(c) The Distributor shall make deliveries hereunder to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, as the Distributor may elect. If deliveries are made to a carrier designated by the Distributor or to a post office, they shall be made in time for prints to reach the place where the said theatre is located in time for inspection and a projection thereof before the usual time for opening said theatre.

(d) Exhibitor agrees to return immediately after the last exhibition on the last date of exhibition licensed, each print received hereunder, with its reels and containers, to the exchange of the Distributor from which the Exhibitor is served, or as otherwise directed in writing by the Distributor, in the same condition as when received, reasonable wear and tear arising from proper use excepted. Exhibitor agrees to pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same and of return to the Distributor's exchange; or if directed by the Distributor in writing, to ship such positive prints elsewhere than to the Distributor's exchange, transportation charges collect. It is agreed that the delivery of a positive print, properly directed and packed in the container furnished by the Distributor, to a carrier designated by the Distributor, and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

(e) If the Exhibitor fails to return or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (if and as directed by the Distributor) any such print to any other exhibitor, the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor. The Exhibitor shall have the right to participate in any compromise of or intervene in any arbitration or legal proceeding based upon any claim for such damage asserted against the Distributor by another exhibitor, notice of which shall be given the Exhibitor by the Distributor.

SEPARATE LICENSING — SCREENING — TWENTY-SECOND: If more than one picture is licensed hereunder, the Exhibitor hereby acknowledges (1) that the Distributor has not required or conditioned the licensing by the Exhibitor of any one or more of said pictures upon any agreement of the Exhibitor to take a license for any one or more other of said pictures, or any other motion picture or pictures, (2) that the licensing of each picture licensed hereunder, and the license fee or Distributor's share of the admission or box-office receipts herein provided, with respect to each such picture, have been separately and severally negotiated and agreed upon, and (3) that the Exhibitor has seen, or has been given due opportunity to see, each and all pictures licensed hereunder of which a print has been received at the Distributor's exchange from which the Exhibitor is served, prior to the execution of this agreement by the Exhibitor.

DESIGNATION — TWENTY-THIRD: The pictures to be included in each of the classes (if any) of pictures licensed hereunder which are described in the above schedule by classes (and not by specific titles thereof), shall be such pictures which the Distributor, in its sole discretion, shall allocate to and designate for each such class. It is understood that the pictures to be included in such given class may not have, at the time of the execution of this agreement, been allocated or designated, and that the above classes may not, at the time of execution hereof, contain any allocation or designation of any particular motion picture, licensed hereunder. Such allocation and designation may be made by the Distributor in respect to each motion picture by written notice thereof to the Exhibitor at or before the time Distributor gives notice to the Exhibitor of the availability of each such motion picture.

The term Distributor, as used herein, shall mean **REPUBLIC PICTURES CORPORATION** or its assignee; and the term Exhibitor, as used herein shall mean

_____

_____

or its assignee (if such assignee is approved in writing by the Distributor).

IN WITNESS WHEREOF, the Exhibitor operating the _____ Theatre, located at _____ in _____ (City and State) has on _____ (Date) executed this application, which, upon written acceptance thereof by the Distributor, shall be deemed to be the license of said Exhibitor for the exhibition of the motion pictures specified in the Schedule, but only at the said Theatre and in accordance with the terms and conditions hereof.

ACCEPTED:

REPUBLIC PICTURES CORPORATION
Distributor

By _____
Authorized Signature

Date _____

_____ Exhibitor
Partnership Corporation Individual (Indicate which)

By _____
Partner Gen. Mgr. Officer (Indicate which)

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77=78

the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

8. Upon the failure of the Exhibitor to so select such date or dates the Distributor may designate such date or dates by mailing written notice thereof to the Exhibitor.

CLEARANCE AND RUN — SIXTH: If (but only if) a "run" is separately stated on the Schedule to be granted exclusively to the Distributor, the Distributor agrees not to exhibit or grant a license to exhibit any motion picture licensed hereunder for exhibition on the same "run" or prior to the expiration of the "clearance period," if any, in the Schedule specified as to any theatre named therein or within the territorial limits specified in the Schedule. Such period of clearance as to each such motion picture shall be computed from the last date the exhibition thereof licensed hereunder. If the clearance granted hereunder shall be determined to be unreasonable as to time or area by any decision, judgment, order or decree in any judicial or arbitration proceeding, then same may, upon written notice by Distributor to Exhibitor, be reduced, as to licensed pictures thereafter exhibited hereunder, to the period and area as shall be in conformity with such decision, judgment, order or decree without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement. If it shall be established by any decision, judgment, order or decree in any judicial or arbitration proceeding that any other theatre or exhibitor is entitled to the same run as is hereunder granted to Exhibitor, or a run similar thereto or in conflict therewith, Distributor may grant to such other exhibitor or theatre the run to which it may be entitled under such decision, judgment, order or decree, without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement — If the license granted herein is subject to any prior run, any booking by the Exhibitor of a picture licensed hereunder, or confirmation of such booking by the Distributor, is subject to change by the Distributor at any time prior to exhibition of such picture by the Exhibitor, in order to permit such prior run.

DESCRIPTION OF PICTURES — SEVENTH: (a) The Distributor, or the producer of any of the motion pictures licensed herein, shall have and hereby reserves the right, in the sole discretion of the Distributor, or the producer thereof, at any time, to change the title of any of such motion pictures, to make changes in, alterations and adaptations of any story, book or play of or in connection with any such motion pictures, and to substitute for any thereof any other story, book or play. The Distributor, or the producer thereof, shall have and hereby reserves the right to change the director, the cast, or any member thereof, of any said motion pictures.

(b) The Exhibitor shall not be required to accept for any feature motion picture expressly described in the Schedule as that of a named star, director, author, book or play, any motion picture of any other star, director, author, book or play, nor to accept any other feature motion picture in place of any thereof which in the Schedule is designated "no substitute." The right of rejection conferred on the Exhibitor by this Clause is in addition to the right of exclusion provided in Clause Fifteenth hereof.

(c) The Distributor warrants that none of said motion pictures are reissues or re-releases of old negatives, or old negatives retitled, excepting those expressly specified as re-releases in the Schedule.

FORD, FELLMAN, MILESTONE, WELLES, WAYNE, ROGERS, COLOR, ETC. PICTURES — EIGHTH: Anything herein to the contrary notwithstanding, the picture or pictures licensed hereunder shall not include any "color" picture or any picture or pictures not produced by the Distributor or any of its subsidiaries, or any picture or pictures of or in which John Ford, Chas. R. Feldman, Lewis Milestone, Orson Welles, John Wayne or Roy Rogers is or shall be a producer and/or director and/or actor, or any other picture or pictures generally licensed for exhibition by the Distributor pursuant to separate contracts which identify or describe such picture or pictures, in whole or in part, by the name of a producer, director or actor, unless specifically and expressly otherwise provided in the Schedule.

ADVERTISING PRIOR TO FIRST RUN — NINTH: (a) If the Exhibitor is licensed a subsequent run of any picture or pictures, the Exhibitor shall not advertise any such picture in any way before the completion of all prior run exhibitions thereof, other than by the general advertising of them as a group, without referring to any one of them. For a breach of the provisions of this Clause the Distributor shall have, in addition to all other rights, the right to exclude from this license any motion picture advertised in violation of the provisions hereof, by written notice to such effect mailed to the Exhibitor, and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor, but without prejudice to any and all rights Distributor may have against Exhibitor on account of such breach.

(b) The Exhibitor also agrees that in all advertising and publicity it will announce each picture as a "Republic Picture."

ACCEPTANCE BY DISTRIBUTOR — TENTH: Until accepted in writing by the Distributor, and written notice of acceptance sent to the Exhibitor, this instrument shall be deemed only an application for a license under copyright, and may be withdrawn by the Exhibitor at any time before such acceptance, by the delivery of a written notice from the Exhibitor to the Distributor that unless within five (5) days after the date of receipt of such notice the Distributor shall mail or telegraph to the Exhibitor notice of acceptance of this application, the same shall be deemed to have been withdrawn; and in such event, if the Distributor shall, within five (5) days after receipt of such notice, fail to mail or telegraph to the Exhibitor, notice of acceptance of this application, the same shall be deemed to have been withdrawn. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment for any purpose or the delivery of a print of any of said motion pictures, shall not be deemed an acceptance hereof by the Distributor.

CHANGES IN WRITING — ELEVENTH: This license agreement is complete and no promises, warranties or representations of any kind (express or implied) in reference thereto have been made by either party to the other, except those expressly set forth herein. No change or modification hereof shall be binding upon the Distributor unless in writing and signed by an officer of the Distributor.

ASSIGNMENT — TWELFTH: This license shall not be assignable or assigned by the Distributor or the Exhibitor, without the written consent of the other, except that this license may, without the consent of the Exhibitor, be assigned by the Distributor to any of its subsidiary corporations, or to any other corporation with which it may merge or consolidate or which may acquire all or substantially all of its assets.

TAXES — THIRTEENTH: The Exhibitor agrees to pay, or if the Distributor elects to pay same, the Exhibitor agrees to repay to the Distributor, an amount equal to the aggregate of all taxes now in effect or hereafter imposed or based upon the license, delivery, exhibition, possession or use by the Exhibitor of the prints of the motion pictures licensed hereunder, or upon the grant of such license or the exercise thereof, or imposed or based upon or measured by the license fees, however determined, which shall be paid or payable by the Exhibitor to the Distributor under this license. The word "tax" as used in this paragraph shall be deemed to include, but shall not be limited to, all taxes, fees, assessments, charges, imposts, levies, and exactions, whether denominated a sales, gross income, gross receipts, personal property, storage, use, consumption, license, compensating, excise or privilege tax. If the amount of any tax payable under this clause cannot be exactly determined, the Distributor may estimate the amount of such tax and the Exhibitor shall pay to the Distributor such estimated amount upon demand therefor; provided, however, that upon the determination of the exact amount of any such tax the Exhibitor shall be entitled to repayment of or credit for any excess amount paid, or shall pay to the Distributor any deficiency, as the case may be. Upon the failure or refusal of the Exhibitor to pay any such tax or any part thereof, the Distributor shall have all the remedies herein provided for the collection of license fees as well as all other remedies provided by law.

PREVENTION OF PERFORMANCE — FOURTEENTH: Anything herein to the contrary notwithstanding, if the Exhibitor shall be prevented from exhibiting any of said motion pictures hereunder because of a strike, fire, insurrection, Act of God, public enemy, public calamity, order, decision, judgment or decree of any court of competent jurisdiction, censorship ruling, or for any similar cause beyond the direct control of the Exhibitor, the license in respect of each such motion picture shall terminate and revert to the Distributor, without liability on the part of either party hereto, provided prompt written notice of such termination and the cause thereof is given by the Exhibitor to the Distributor. Anything herein to the contrary notwithstanding, if the Distributor shall be delayed in or prevented from performance of this agreement, with respect to any motion picture or pictures licensed hereunder, because of a strike, fire, insurrection, Act of God, public enemy, public calamity, order, decision, judgment or decree of any court, censorship ruling, delay of any common carrier or of the United States Postal authorities, failure to produce by delay in production of any such picture, inability of Distributor to obtain the necessary print or prints, or any other cause beyond the control of the Distributor, then such delay or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived and released by the Exhibitor, and the license with respect to such picture or pictures may, at the option of the Distributor, upon giving written notice thereof to the Exhibitor, be terminated, and in such event shall revert to the Distributor, without liability on the part of either party hereto. Anything herein to the contrary notwithstanding, if any motion picture or pictures licensed hereunder shall not in any event be generally released by the Distributor prior to June 30, 1951, in the territory serviced by the Distributor's exchange serving the Exhibitor, such picture or pictures shall, at the option of the Distributor or its assignee, be excluded from this agreement, and the license in respect thereof shall terminate, without liability on the part of any party hereto.

OPTION TO EXCLUDE — FIFTEENTH: If this agreement shall license the exhibition of any pictures which the Exhibitor shall not, before the execution hereof by the Exhibitor, have had an opportunity to view in the city in which is located the Distributor's exchange serving the Exhibitor, the Exhibitor shall have the option of excluding from the license hereunder granted one out of each five such pictures, provided at least five such pictures are licensed hereunder; provided, however, that the Exhibitor shall have no right of exclusion hereunder if and when Exhibitor is in default hereunder, and that the Exhibitor shall not have the right to exclude any picture hereunder unless he shall give the Distributor written notice of such exclusion within ten (10) days after the date when he shall have viewed or had an opportunity to view such picture in said city.

MIDNIGHT SHOWS — SIXTEENTH: The license herein granted for the number of days specified in the Schedule shall not include the right of exhibition at any time previous to dawn of the first licensed and booked date of exhibition, without securing written permission of the Distributor hereunder.

DEFAULT BY EXHIBITOR — SEVENTEENTH: (a) If the Exhibitor shall fail or refuse to pay the rental of any motion picture as provided in this license, or to furnish statements of the receipts of said theatre, if any are required hereunder, or to give any person or persons authorized by the Distributor access to the said theatre, or its box-office, and/or the Exhibitor's books and records relative to motion pictures, the rentals of which are based upon the said theatre's admission or box-office receipts as herein provided, or if the Exhibitor shall fail to comply with the provisions of clause Third hereof in any other respect, or if the Exhibitor shall exhibit or permit the exhibition of any of said motion pictures at any time or place other than as herein specified, or if the Exhibitor shall in any other respect fail, neglect or refuse to pay, keep or perform any of the obligations, terms, covenants, conditions or provisions hereof, or of any other exhibition contract heretofore or hereafter executed between the parties hereto, or if the Exhibitor shall become insolvent or adjudicated a bankrupt, or shall execute an assignment for the benefit of its creditors, or if a receiver or trustee is appointed for any of the property of the Exhibitor, or if the Exhibitor voluntarily or by operation of law should lose control of said theatre, or of its interest therein, or, in the event of the destruction of said theatre or the failure of said theatre, for any cause whatsoever, to be operated in the usual, normal course of business for a period of more than 60 days, then, upon or at any time after the happening of any one or more of said events, the Distributor may, at its option, (1) terminate this license agreement, or (2) suspend the delivery of additional motion pictures hereunder until each and every such default or defaults, event or events, shall be remedied, cured or removed; and it is understood that any such termination of this license agreement by the Distributor shall be without prejudice to the liability of the Exhibitor for any moneys then owing to the Distributor or which may grow due to the Distributor with respect to all motion pictures licensed or agreed to be licensed hereunder, not then exhibited and/or paid for hereunder, irrespective of the time of payment thereof herein provided; and all such moneys owing or to grow due shall, at the option of the Distributor, be immediately payable by Exhibitor to the Distributor. The exercise of any of said remedies or the taking of any such actions by the Distributor shall be in addition to, and without prejudice to, any right or remedy which the Distributor may have against the Exhibitor, at law or in equity, or otherwise, hereunder.

(b) Performance or observance by the Exhibitor of each of the covenants herein contained on its part to be performed or observed shall be a condition precedent to the performance or observance by the Distributor of the covenants or any of them herein or in any other exhibition contract heretofore or hereafter executed between the parties hereto contained on its part to be performed. Exhibitor hereby expressly grants Distributor the further right to demand and receive as a condition precedent to delivery of the print or prints of any motion picture licensed hereunder, payment of all amounts then due, or claimed by the Distributor in good faith to be due, to Distributor from Exhibitor on account of any motion pictures licensed to Exhibitor under this or any other such exhibition contracts, and the Distributor may require payments of all said sums to be made in cash prior to delivery of any such print or prints.

CUTTING OR ALTERATION OF PRINTS — EIGHTEENTH: The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, subrent or, except as may be requested in writing by the Distributor, part with possession of any print. The Exhibitor shall not cut or alter any print, excepting to make necessary repairs thereto, or when required by any duly constituted public official or authority or with the written or telegraphic consent of the Distributor.

EFFECT OF PARTIAL INVALIDITY — NINETEENTH: The invalidity of any of the terms or provisions of this agreement under any present or future law shall not affect the validity of any of the other terms and provisions hereof, and the remainder of this agreement shall continue in force with the same effect as if said invalid terms or provisions had not been included herein.

SCHEDULE OF PICTURES — RENTAL TERMS — PLAY-OFF RATE — TWENTIETH: The following Schedule and all the written and printed parts thereof are a part of this license agreement. (continued on reverse side).

(END OF SCHEDULE)

(Continued from reverse side)

13. **TAXES**—Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the pictures or upon the grant of this license or the exercise thereof or based upon or measured by the license fees or any part thereof, however determined, paid or payable by Exhibitor to Distributor under this agreement. The word "tax" as used in this paragraph shall be deemed to include but shall not be limited to taxes, fees, assessments, charges, imposts, levies, excises, however designated, whether as a sales, gross income, gross receipts, storage, use, consumption, license, compensating, excise, privilege or other exaction. If the exact amount of any tax is not definitely fixed or cannot be exactly determined, Distributor may estimate the amount of such tax and Exhibitor shall pay to Distributor such estimated amount upon demand therefor. Upon final determination of the exact amount Exhibitor shall be entitled to repayment of any amount paid in excess of the tax. Upon the failure or refusal of Exhibitor to pay any tax Distributor shall have the same remedies as herein provided for default in payment of license fees in addition to the other remedies provided by law.

14. **PREVENTION OF PERFORMANCE**—If the Exhibitor shall be prevented from exhibiting or the Distributor from delivering any of the licensed pictures, by reason of fire, strike, labor dispute, riot, insurrection, war, catastrophe, casualty, the public enemy, legal proceedings, rules and regulations of any governmental body or authority, act of God or the elements, and, without limiting the foregoing, any cause beyond the control of either party, the delivery of pictures hereunder shall be temporarily suspended for the time equal to the period performance is so prevented. Performance shall be resumed by the party so affected immediately after the removal or abatement of the cause of such interruption and the repair of any damage occasioned thereby. If such suspension of performance shall continue for a period of 30 days, this license in respect of each such picture shall forthwith terminate and revert to the Distributor without liability on the part of either party.

15. **DEFAULTS**—If the Exhibitor shall fail or refuse to perform the terms and provisions of this or any other agreement, or any of them, or if the Exhibitor becomes insolvent or is adjudicated a bankrupt, or executes an assignment for the benefit of creditors, or if a receiver or trustee is appointed for any of the property of the Exhibitor, or if the Exhibitor voluntarily or by operation of law should lose control of the said theatre or of his said interests therein, or the entry of an order approving a petition filed by or against the Exhibitor under the Bankruptcy Laws then, upon the happening of any one or more of said events, the Distributor may at its option: (1) terminate this and any other license agreements, or (2) suspend the delivery of pictures hereunder until such default or defaults shall cease and be remedied. The exercise of either remedy by the Distributor shall be in addition to and without prejudice to any right or remedy of the Distributor against the Exhibitor at law or in equity or otherwise provided for in this agreement.

16. **CUTTING OR ALTERATION OF PRINTS**—The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, sub-rent or part with possession of any print. The Exhibitor shall not cut or alter any print, other than to make necessary repairs thereto, or when required by a duly constituted public official or authority.

17. **REISSUES**—The Distributor warrants that none of said pictures is a reissue of an old negative or an old negative retitled, except those specified as such in the Schedule.

18. **TICKETS OF ADMISSION**—When pictures are exhibited at a license fee based upon a percentage of the gross Box Office receipts, the Exhibitor agrees that admission to the theatre shall be obtained only by the presentation of a ticket issued at the Box Office of the theatre for each person (child or adult) admitted, excepting a reasonable number of passes. The Exhibitor agrees all tickets shall be serially numbered consecutively in Arabic numbers from 1 up to 500,000. Series of tickets shall be distinguished by using as a prefix to the numbers letters of the alphabet in order starting with the letter "A". Not more than one series of tickets shall be used at any time and none shall be duplicates. Tickets shall bear the name of the theatre for which they are sold and the price of admission and all taxes. Tickets of different admission prices shall have separate and decidedly distinct colors. Only a reasonable number of free admissions consistent with good judgment and general current practices will be issued.

19. **FIRST EXHIBITION**—The license herein granted does not include the right of exhibition at any time previous to Eight A. M. of the first licensed and booked date of exhibition without written permission.

NOTICE TO EXHIBITOR:- If two or more features are licensed herein, it is simply for convenience and this application is a separate application for each picture. The rules of this Company require that each feature should be separately offered to you, the license thereof separately negotiated, and that the license of any picture should not be conditioned upon the license of another.

IN WITNESS WHEREOF, the parties hereto have duly executed these presents this _____ day of _____, 193____.

TWENTIETH CENTURY-FOX FILM CORPORATION

By _____

Exhibitor: _____
An Individual—A Partnership—A Corporation
(strike out two)

By _____
Partner—Officer
(strike out one)

81=82

other unperformed contracts between Distributor and Exhibitor and recover from Exhibitor as damages therefor, the amount payable as license fees in respect of all pictures not exhibited and paid for, computed pursuant to the provisions of this paragraph 4.

5. **DELIVERY AND RETURN**—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the Exhibitor or to the Exhibitor's authorized agent, or to a common carrier designated by the Exhibitor, or to the United States Postal authorities as agent for the Exhibitor. Exhibitor shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same.

(b) The Exhibitor shall return immediately after the last exhibition licensed hereunder, each print received hereunder, with its reels and containers to the exchange of the Distributor from which the Exhibitor is served, or as directed by the Distributor, in the same condition as when received, reasonable wear and tear due to proper use excepted. The Exhibitor shall pay all costs of transportation in returning said print, but if directed by the Distributor to ship such print elsewhere than to the Distributor's exchange, it may send the same transportation charges collect.

(c) If Exhibitor fails to or delays the return of any print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor, it shall pay the Distributor a sum equal to the damage, if any, so caused the Distributor and, in addition, the damage, if any, so caused such other exhibitor.

6. **LOSS AND DAMAGE TO PRINTS**—The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange of each linear foot of any print, lost, stolen, destroyed or injured in any way in the interval between the delivery to and return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within thirty (30) days after the date when the same should have been returned hereunder. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent Exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, immediately after the first public exhibition thereof, shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

7. **SELECTION OF PLAY DATES**—Unless otherwise specified in the Schedule, the exhibition date or dates of each of the pictures shall be determined as follows:

(a) Subject to prior runs and clearance granted or hereafter granted by the Distributor to other exhibitors, the Distributor shall mail to the Exhibitor a notice in writing specifying the first date upon which such picture will become available for exhibition by the Exhibitor (which notice is hereinafter referred to as "notice of availability" and which date is hereinafter referred to as the "available date.").

(b) Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

(c) If such date or dates are acceptable to the Distributor it shall forthwith confirm the same in writing to the Exhibitor, and the Exhibitor shall exhibit the picture on such date or dates.

(d) If such date or dates are not acceptable to the Distributor it shall promptly notify the Exhibitor and the Distributor and the Exhibitor shall thereafter endeavor to agree upon mutually acceptable exhibition date or dates.

(e) If mutually acceptable exhibition date or dates have not been agreed upon within thirty (30) days after the mailing of the notice of availability, the Distributor shall designate in writing to the Exhibitor the date or dates upon which the picture shall be exhibited, and the Exhibitor shall exhibit the picture on such date or dates.

(f) If the Exhibitor is granted a first run of any picture and shall fail for any reason to exhibit such picture within thirty (30) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a second run of any picture and shall for any reason fail to exhibit such picture within twenty-one (21) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a run subsequent to a second run of any picture and shall for any reason fail to exhibit such picture within fourteen (14) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, the clearance, if any, herein granted is waived by the Exhibitor and the Distributor may make such picture immediately available to others. The Exhibitor shall, nevertheless, be obligated to exhibit the picture and pay therefor the license fee specified in the Schedule, and upon failure to exhibit the same to pay such license fee computed as provided in paragraph 4 hereof.

8. **CLEARANCE AND RUN**—The Distributor shall not exhibit or license the exhibition of any of said pictures in conflict with the run or prior to the expiration of the clearance period, if any, specified in the Schedule at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said pictures shall be computed from the last date of the exhibition thereof herein licensed.

The "trade showing", "road showing", "tryout", "pre-view" or "pre-release" of any picture shall not be deemed either a run of any picture or to be in conflict with any license granted hereunder.

If the licensed run hereunder is not a first run, Distributor may license any picture hereunder as a continued first run either at the theatre where the picture is being exhibited as a first run or at another theatre immediately after the first run without any days intervening and prior to any other run, excepting first run. The Exhibitor's availability of any pictures exhibited on a continued first run shall be postponed and any clearance granted the theatre exhibiting such continued first run shall be extended for a period corresponding to the length of such continued first run, unless otherwise specified in the Schedule. The Distributor may require the Exhibitor and the Exhibitor agrees to exhibit on the terms herein specified the pictures herein licensed on any earlier run than herein licensed. The fact that any or all of the within licensed pictures have not been exhibited on any earlier runs than the run herein licensed shall in no wise affect this agreement or release or relieve either of the parties of their respective obligations hereunder.

9. **ADVERTISING**—The Exhibitor shall advertise and announce each licensed picture as "A Twentieth Century-Fox Production" or "A Twentieth Century-Fox Release," as the Distributor may require. In all newspaper advertising and publicity issued by the Exhibitor relating to each licensed picture the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

10. **ACCEPTANCE BY DISTRIBUTOR**—Until accepted in writing by an officer of or a person authorized by the Distributor and notice of acceptance sent to Exhibitor, this instrument shall be deemed only an application for a separate and distinct license for each picture appearing thereon and may be withdrawn by the Exhibitor in whole or in part at any time before such acceptance. The acceptance by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment for any purpose or the delivery of a print of any of the pictures shall not be deemed an acceptance hereof by the Distributor. The rejection by the Distributor or the withdrawal by the Exhibitor prior to Distributor's acceptance of this application with respect to one or more pictures appearing hereon shall apply only to such picture or pictures and any such rejection or withdrawal shall not in any wise affect any other picture or pictures appearing hereon for which the Distributor shall accept this application.

11. **CHANGES IN WRITING**—This agreement is complete and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change or modification hereof shall be binding upon the Distributor unless in writing signed by an officer of or a person authorized by the Distributor.

12. **ASSIGNMENT**—This agreement shall not be assigned by either party without the written consent of the other.

(Continued on reverse side)

riers now operating within the six western states composing the Tenth Circuit, of a major portion of their traffic and thereby divest them of vital annual operating revenues heretofore enjoyed by them and recognized as rightfully theirs. This loss of traffic and revenues obviously will render the intrastate operating rights of these carriers eventually worthless and bring about general bankruptcy among them, for the decision herein will not only be applicable [fol. 98] to motion picture film but also to commodities generally distributed by national manufacturing and producing industries locally within states. For example, it is difficult to conceive of a single industry operating upon a national scale that does not intend that the commodities they ship to their various state distributors shall be transported to dealers or exhibitors at final destinations within each state. Yet in most instances this type of distribution within a state has long been accepted as intrastate transportation, subject to state regulation.

Unquestionably the decision herein will have a highly detrimental and damaging effect upon the businesses and industries of many people far beyond the interests of the immediate parties involved. We feel that we are not only representing our clients' interests in urging this petition for rehearing, but that we are also representing important principles affecting many people. As Chief Justice Fred M. Vinson noted in his recent address before the American Bar Association, "You represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the Country."

We sincerely submit that the opinion herein drastically alters the present concept of the distinction between interstate and intrastate transportation now generally accepted by other courts, national and state regulatory agencies, and the public.

For these reasons we ask the Court's special indulgence in the consideration of this petition, and we trust that our position is sufficiently clarified in the following brief to justify a reconsideration by the Court of its opinion and judgment heretofore rendered in this cause.

[fol. 99] ARGUMENT

I

The Opinion Misconstrues and Ignores Fundamental and Controlling Facts

One of the fundamental premises upon which the opinion is based is that there is a continuing intent that the goods shall be transported until they reach a designated place, and that under the contracts of exhibition, both the theatre-exhibitor and film distributor understood that the film should continue in transportation until it reached the exhibitor's theatre. This presumes, among other things and as the opinion distinctly indicates, that the film is neither within the state of Utah nor released for exhibition to the public at the time the contract is executed. As the Record shows, the majority of films, with the exception of newsreels and a relatively small volume of shorts, have actually been shipped to the distributor in Salt Lake, processed, screened at that office, and stored in vaults before the exhibition contract is either considered or executed.

Mr. Charles L. Walker of 20th Century Fox testified as follows at page 64 of the Record:

> "Q. Do you follow the procedure of screening, in your sale of features?
>
> "A. Yes, we very seldom, if ever, solicit the account on feature products until we first have a trade showing. In other words, the print is sent from New York ahead of the actual time we start selling it. We determine a definite date for a trade showing. We notify the exhibitors and after that date we sell the feature. We do not sell it before the showing."

[fol. 100] Mr. Elliott S. Windward of RKO Pictures, Inc., stated at page 54 of the Record:

> "Q. Are your company's film screened before they are sent out to the theaters for showing?
>
> "A. Practically every feature we have is screened with very few exceptions.
>
> "Q. At that screening the exhibitors come in the screening room, look at them and decide which ones they want?

"A. They are invited to come in.

"Q. And so far as the particular film is concerned you don't know until it has been screened and has been purchased by the exhibitor where it is going to go?

"A. That is right, we don't know."

Mr. Windward testified immediately following the foregoing quote that only a few exhibitors actually attend the showing, but his testimony remains without change that whether the exhibitors attend the film screenings or not, the contracts of exhibition are not executed until after the screening within the State of Utah has occurred. Manifestly, there can be no "continuing" movement where the contracts of exhibition are not even considered nor executed until after the films have arrived at the Utah exchanges, processed, and placed in vaults to await screenings and sales.

Next, the conclusion of the Opinion that there is a "continuing intent that the films shall be transported until they reach a designated place," is based upon a quotation from plaintiff's Exhibit 1, paragraph 21 (e), which is the exhibition contract of the relatively minor film producer, Repub- [fol. 101] lic Pictures. This contract provides that the distributor may elect to make film delivery to the exhibitor or agent by delivery at the exchange to a common carrier, or postal authorities, as the film distributor may elect. This particular provision is apparently quoted and italicized to emphasize that the film distributor and not the theatre exhibitor contracts for and selects the method of transportation. It is true that this contract gives some leeway in this direction, in that it grants an option to the distributor to make delivery of the film to a selected mode of transportation, although in the case of the common carrier, the individual carrier may still be selected by the exhibitor as far as this contract is concerned. However, the oral testimony hereafter quoted makes it clear that selection of transportation is made by the theatre exhibitor and not by the film distributor.

As Mr. Charles R. Wade of Universal International Film Exchange stated at page 37 of the Record:

"Q. Is the point of delivery directed by you or by the individual theater?

"A. The point of delivery?

"Q. Yes.

"A. The point of delivery? It is either by arrangement that the theater man makes with an individual truckline, or he might request we ship it by *Parcels* Post; might be an inland point where he has no means of transportation other than Parcels Post, or if there is no arrangement made at all, we automatically ship the print express."

As Mr. Thomas A. McMahon of Republic Pictures stated at page 61 of the Record:

"Q. In the cases where you ship film to theaters in Utah, by a common carrier truck line, you deliver that film to the truck line f.o.b. at your distribution office? [fol. 102] "A. They pick it up in our office.

"Q. And the exhibitor, in all cases, is liable for the freight charges?

"A. That is right.

"Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?

"A. The exhibitor enters into the agreement with the common carrier—we don't."

As Mr. Charles L. Walker of 20th Century Fox Film Corporation stated at page 71 of the Record:

"Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?

"A. It is between the exhibitor and the carrier.

"Q. And the exhibitor pays the charge?

"A. They designate how they are to ship."

As Mr. Elliott S. Windward of RKO Pictures, Inc., stated at page 50 of the Record:

"Who determines which method of transportation will be employed?

"A. The exhibitor."

Moreover, the contract provision cited in the opinion is contrary to that of the major producer, 20th Century Fox,

Film Corporation, plaintiff's Exhibit 3, wherein paragraph 5(a) specifically provides as follows:

> [fol. 103] "5. DELIVERY AND RETURN—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the *Exhibitor* or to the *Exhibitor's* authorized agent, or to a common carrier designated by the *Exhibitor*, or to the United States Postal authorities as *agent for the Exhibitor*. *Exhibitor* shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous *Exhibitor* having possession of the same."

The testimony of the witnesses, including the Republic Pictures representative, is repeatedly to the point that it is the theater Exhibitor and not the Distributor who contracts with, pays for, and selects the transportation carrier.

Thus, it is most apparent that although the opinion places stress upon and points out the testimony of Witness Windward, as indicating conclusive evidence of control of entire journey of film by the distributor, yet all four witnesses including Windward, testified that the theater exhibitor and not the film distributor determines the method of transportation within Utah between the film exchange and theaters, employs the carrier, and assumes the responsibility of transportation of film locally in Utah.

Any conclusion based upon the foregoing testimony must be to the effect that control of local transportation is exercised by the theater exhibitors in Utah and that film does come to rest at the Salt Lake exchange.

The evidence in the Record does not support the Court's conception of the flow of commerce, nor of any intention on the part of the contracting parties that such should occur. [fol. 104] The opinion does make a casual reference to processing of the film at Salt Lake City upon initial receipt from New York or Los Angeles, and to the inspection which is made of the film between exhibitions wherever possible. These facts are most important. As is detailed in appellee's brief, films reach Utah from the out-of-state laboratories in large pasteboard cartons—raw celluloid film only—, are reassembled in two thousand foot lengths wound upon metal

reels supplied by the local exchanges, with additional film added known as "heads and tails" to facilitate use in theater projection machines, thoroughly inspected, placed in heavy protective metal containers also supplied by the local exchanges for protection of the film during local handling, and then placed in storage vaults within the local exchanges to await trade screenings, negotiations, and booking arrangements with exhibitor theaters.

As Witness Thomas A. McMahon of Republic Pictures testified at page 57 of the Record:

> "Q. In what type of containers do film come to you for distribution in this area?
>
> "A. In paper cartons, and the prints are in thousand-foot cans, as Mr. Wade explained.
>
> "Q. What procedure do you follow for exhibition?
>
> "A. We mount them on two thousand foot rolls, store them in cans, put them in the vault, waiting for bookings."

As Witness Charles R. Wade of Universal Pictures testified at page 39 of the Record:

> "Q. I believe you misunderstand me. When the film is received from outside the State, isn't it a fact that it is just the celluloid itself?
>
> [fol. 105] "A. You mean the new film that has not been run? Yes, that is right.
>
> "Q. Just the celluloid itself?
>
> "A. That is right."

Mr. Wade further testified at page 39 of the Record:

> "Q. You mean it is measured off in reels when it comes from New York?
>
> "The Court: You mean it is not on a reel?
>
> "A. It is not on a reel, no.
>
> "Q. Is it in such condition that it could be put in a projection machine for showing?
>
> "A. No.
>
> "Q. Now describe to the Court minutely what is done with this film after it is received at your branch office by your employees.
>
> "A. You are referring to new prints?

"Q. New prints——.

"A. We mount the film, what we term "mounting" by taking these thousand foot rolls—we take two of them and put them together on a 2,000 foot reel because there is no reel there to begin with; after mounted on the 2,000-foot reels, the complete picture itself has been physically inspected and put together, then we put it in what we call our shipping cases, which is a steel case.

"Q. Do you also place what you call 'heads and tails' on these films?"

[fol. 106] Mr. Wade further testified at pages 46-47 of the Record:

"Q. Directing your attention to Short Subject reels we will say one particular reel, Passing In The Night, something like that, do you receive more than one reel of that particular film?

"A. You mean one print?

"Q. Yes.

"A. Yes, we do.

"Q. You receive five or six from New York or Hollywood?

"A. Might be two or three. We don't get them from Hollywood.

"Q. Well, out of the State?

"A. Yes.

. . . . . .

"Q. Do you know as a matter of fact when the three prints arrive at your distribution point which one of these prints go to a particular exhibitor or a particular area?

"A. No, we don't. That is a method of booking.

"Q. That is all booked here at your distribution office?

"A. Yes, sir."

Mr. Wade also testified at bottom of page 45 of the Record:

[fol. 107] "Q. Is that true as to all features, that the ultimate destination, as far as exhibition is concerned, is not known when the film arrives in Utah?

"A. I would say yes, it is not known.

Mr. Wade further testified at page 41 of the Record:

"Q. Now let me ask you this: is it not a fact that only after the film is available in Utah, are the bookings made to these various theatres and the dates set?

"A. That is right.

"Q. Now, when these films are shipped into Utah, then, for distribution in Utah, it is not known where you will prescribe these particular films, on what particular dates, to what particular theaters, is it?

"A. That is right. We don't know at the time."

It must be apparent from the foregoing quoted excerpts of testimony offered by the Appellant itself that each single package shipment of raw celluloid film containing, as it does, the territory quota of film for a given exchange could not be and was not intended to be continuously transported until such single package shipment reached a theater in Utah. The theater exhibitor would have no use for three or four issues of one particular picture, and the National distributor has no intention at the time the carton of raw film is shipped that it go to any final theater in Utah. In truth, no shipment of film, in light of the evidence in the record, could be billed on a through interstate billing from an out-of-state laboratory direct to any given theater destination in Utah. The single package carton of film must, of necessity, under the adopted method of distribution, be shipped to a given Salt Lake film exchange where the single package shipment must be broken open, the films inspected, [fol. 108] equipped with "heads and tails," wound upon metal reels, placed in protective metal shipping containers and thereafter lodged in storage vaults to await negotiations, in most instances screenings, and bookings with local theater exhibitors. All this is prior to any local transportation of a single picture in Utah. The films most assuredly come to rest at the exchange. As testified to by Mr. McMahon of Republic Pictures at page 62 of the Record:

"Q. When these pictures are produced and shipped in here, are they shipped directly to the theater that exhibits them?

"A. No, sir.

"Q. Are they shipped to your film exchange?

"A. Yes.

"Q. When they arrive at your film exchange, they are processed as you describe?

"A. Yes.

"Q. You take them out of a 1,000 foot container and put them in a 2,000 foot roll?

"A. Yes.

"Q. So you have no immediate need for them?

"A. No.

"Q. So they come to rest in your place of business for awhile?

"A. For a while.

. . . . . .

[fol. 109] "Q. Then they are sent out to the trade pursuant to your bookings?

"A. That is right."

It is most difficult therefore in light of the foregoing testimony to understand the assumption in the opinion that the films are sent to the theater exhibitors upon a completely pre-determined schedule, and still more difficult to understand the conclusion of the Court that "it cannot be said that the film came to rest at the exchange, as the term is understood, in order to end interstate transportation."

The general finding of uninterrupted flow of transportation of film from out-of-state laboratories to Salt Lake exchanges, thence to theaters and between theaters, thence back to the exchange and from there to the out-of-state laboratories without once coming to rest is indeed puzzling when the undisputed testimony of the witnesses is carefully considered. Despite (1) the complete transformation of the original carton shipment after its arrival at the exchange in Salt Lake City from a pasteboard box full of raw celluloid film—purposely shipped thus so as to classify it for light-weight express rate—into several shipments of film wound upon metal reels in special heavy metal containers taking an entirely different classification and transportation rating, the opinion decides that the film does not

come to rest. Despite (2) the admitted fact that the first leg of the journey from out-of-state to Salt Lake City with the film-distributor being both the consignor and consignee and paying for and controling the transportation, while the second leg of the transportation movement is either by motor common carrier, private car of the theater-exhibitor himself, or by parcel post, admitting of no opportunity for through-route-joint rate arrangements or continuous handling responsibility, and with the local theater-exhibitor paying all charges and taking all responsibility for transportation, the opinion assumes that the film does not come to rest. Despite (3) the fact that the single [fol. 110] cardboard shipment of raw film containing the entire Salt Lake exchange quota could not be billed under a through billing, over a through route and under joint rate to one given theatre destination in Utah because all of the films in the original shipment are not intended to move continuously to any destination, other than the Salt Lake exchange, the opinion herein holds that the film still does not come to rest. Despite (4) the fact that the majority of all film handled by the Salt Lake exchanges must be trade-screened in Utah before contracts can be made, films sold or bookings arranged, still it is held that the film does not come to rest. Surely there must have been some misunderstanding of the facts herein that deserves and merits r-consideration by this court.

Furthermore, it should be pointed out that the continuous flow theory of the opinion would seem to overlook the provisions of the written contract for exhibition, plaintiff's Exhibit 1, and particularly Section 22 (3) thereof, which specifically provides that the exhibitor must have an opportunity to see all pictures licensed under the contract prior to execution of the agreement. It follows that theatre exhibitors in Utah could not be provided with the opportunity of viewing the pictures before executing the contract unless and until the pictures are available in Utah at the Salt Lake exchanges. It is also noted that the last sentence of paragraph 14 of plaintiff's Exhibit 1 contains a provision that if the distributor does not release the film prior to a specified date in the territory, the distributor shall have the right, at its option, to terminate the exhibition

agreement. This would again indicate that from the transportation standpoint, the determining arrangement lies in the booking negotiation at the local exchanges after films have arrived in Salt Lake City, rather than in what we have termed the general exhibition agreement, since the latter seems subject to certain restrictions and possibilities of cancellation.

The foregoing are by no means all of the factual points which must be considered in determining the essential [fol. 111] nature of this transportation. For the reasons indicated, we are firmly convinced that the opinion has neither correctly nor adequately summarized the Record, nor does it reflect an appreciation of the manner in which the film transportation is accomplished.

II

The opinion misconstrues relevant federal authority as applied to the facts of this case.

It is not our intention to review in detail all of the authorities which were cited in appellees' original brief in this petition for rehearing, although we do respectfully urge the Court to reconsider the same.

Our essential concern, however, in this petition, lies in the citation of authorities in the opinion which seems to be diametrically opposed to the indicated holding of the opinion. Thus, the opinion states that if there is a continuing intent that the goods shall be transported until they reach a designated place, the transportation is a continuing one, notwithstanding that there may be a temporary stoppage en route for a particular purpose. In support of this statement, the Court cites *Atlantic Coast L. R. Co. v. Standard Oil Co.*, 275 U. S. 257 known as the Second Standard Oil Case. As an abstract and simplified statement of the law under proper facts, the opinion is correct. It can only be presumed, however, that in citing this case, the opinion concluded that the facts of that case were somewhat similar to those of the instant case, and that the decision supported the opinion. The Supreme Court, however, actually reached the conclusion that the transportation involved, which was factually similar to the instant case, was *intra*state transportation. Since this Supreme Court decision has been long

recognized as one of the leading federal authorities on the relation of distribution of goods and intrastate transportation, we suggest that it is of the utmost importance.

[fol. 112] There, Standard Oil maintained in Florida storage tanks and warehouses for receiving and storing oil products produced and shipped to Florida from other states and countries. From the Florida facilities, the Standard Oil Company reshipped the oil products to local bulk stations in Florida, which in turn shipped them to consumers by means of tank wagons, and in occasional instances, service stations were supplied with gasoline directly from the Florida main storage facilities. It will be noted that in a very broad sense, there was an intention that the products coming from without Florida would necessarily ultimately be delivered to consumers within Florida from the bulk storage facilities. There would seem to be a far closer relationship to a continued transportation in this case than in the instant case, where the films are processed and original package shipment altered after arriving in Utah. The contracts of booking as to specific time and place are determined after such arrival, under transportation contracts between the film exhibitor and the carrier, and frequently, under exhibition contracts which are executed subsequent to the film arrival and showing in Utah. Even in those instances where an exhibition contract is executed prior to the time of arrival of the film in the state, there is an analogy to the Standard Oil Company case, which points out that 95% of the fuel oil sold by Standard Oil was on contracts executed before the oil had been shipped from point of origin, and many of which extended for a period of one year in advance. The decision likewise points out that at the time of the shipment of the oil, the Standard Oil Company did not know where any particular cargo or part would go, to whom it would go, or when it would be shipped. Again, there is a striking analogy to film transportation, where likewise when the film is shipped from out-of-state laboratories to Utah, the distributing company does not know the destination to which a particular portion of the reassembled film will go, nor to whom it will go nor the date of such further shipment. This is equally true whether the exhibition contract is made prior to or after arrival in Utah, as the Record is very clear that in practi-

cally all instances the booking arrangements setting up [fol. 113] the time and place of exhibition, and therefore of transportation, are made long after film arrival. In this connection, we should point out that as to a very limited part of the film shipments, namely, news reels,* there are instances where film is shipped from New York or California in an exhibiting condition, without processing or checking, and directly to the exhibitor for showing at a specific time and place. In this aspect, news reel handling is entirely distinct from other types of film.

The decision further goes on to point out that the determination of whether transportation is inter or intrastate must be determined by the essential character of the transportation, not by mere billing or other forms of contract, although these may be one of a group of circumstances relevant to the determination. The opinion Specifically states, at page 268:

> "The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement, or prevent a shipment to a point within the same state from having an independent or intrastate character, even though it be in the same course."

The opinion specifically states that the Court had no hesitation in saying that the nature of the transportation was intrastate, and in view of the close relation of facts between the oil in that case and the film in this case, it is difficult to see upon what basis the opinion can cite the Second Standard Oil Case in support of its conclusion that the film transportation, excepting possibly news reels, is interstate.

The Supreme Court in this Second *Standard Oil Case* cited with approval an earlier Circuit Court case, as to which certiorarai had been denied, *Atlantic Coast L. R. Co.* [fol. 114] *v. Standard Oil Co.*, 12 F. (2d) 541, Cert. Den. 273 U.S. 712, known as the First *Standard Oil Case*. This earlier case has likewise been long recognized as one of the leading federal cases on the subject. Factually, it is very similar to the Second *Standard Oil Case*.

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* See discussion of *Transway Case* in later part of this brief for Status of Newsreels.

The Court in this First *Standard Oil Case* cited with approval at page 545, the following language from an earlier U. S. decision—(*B. & O. S. W. R. Co. v. Settle*, 260 U. S. 166):

> "The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. * * *"

The Court further stated at page 546:

> "And in closing the opinion, the court used the language heretofore quoted, to the effect that there are many instances where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, *even though some further shipment was contemplated when the original movement began, and that shipments to and from distribution points* often present this situation.
>
> "The argument that complainant had in contemplation the shipments to its substations at the time of the transportation to Wilmington, and that therefore the shipments from Wilmington constituted one movement with the interstate shipment to that point, has an ele- [fol. 115] ment of plausibility, but it is answered by the distinction drawn by Justice Brandeis in the Settle case, to which we have just adverted. And that intention to make further shipment cannot convert what is essentially an intrastate shipment into interstate commerce has been expressly adjudicated by the Supreme Court in another case, *Southern Pacific Co. v. Arizona*, 249 U. S. 472, 39 S. Ct. 313, 63 L. Ed. 713."

The decision also makes a distinction which the opinion of this Court seems to have entirely overlooked, and that is *between the essential nature of the business* and *the*

essential nature of the transportation involved. Many of the films shipped from the Salt Lake Exchange are destined for other states, and as to these, we believe there can be no question but that such a shipment is interstate transportation. Because of this, in many instances the film distribution business might be characterized as interstate in nature, but as to the film transportation from and to the Exchange in Utah to exhibitors in Utah, and between exhibitors within the same state, we are not concerned with the essential nature of the business, but with the essential nature of the transportation involved.

In the First *Standard Oil Case*, supra, confirmed by the Second *Standard Oil Case*, supra, the Court distinguished between cases concerned with the essential nature of the business and cases concerned with the essential nature of the transportation.

The Court stated at pages 547 and 548:

> "That there is a difference in the principles applied to the two classes of cases is apparent at a glance. In the one case it is the essential nature of the business which governs; in the other it is the essential nature of the particular transportation involved If a group of merchants buying and selling goods in interstate commerce should conspire to raise prices, they would unquestion- [fol. 116] ably be amenable to prosecution under the Sherman Act; but this would not authorize a transportation company to charge interstate rates on a shipment of goods which one of the merchants might make to another within the same state. As said by Judge Sibley in A.C.L. R.R. vs. R.R. Commission of Georgia (D.C.), 281 Fed. 321
>
> " 'While the business of buying and selling goods, interstate commerce may reach all the way from first purchase to final delivery, interstate transportation for the purpose of determining the rate to be charged may have narrower limits.' "

We trust that the foregoing will sufficiently amplify and justify our previous statement that in citation of this authority to determine the nature of the transportation of films in this case, the opinion has misconstrued either the

facts or this authority, which held that the transportation involved was intrastate in character.

As a companion citation to the *Standard Oil Company Case*, supra, the opinion cites *United States v. Erie R.R. Co.*, 280 U S. 98. While in a very broad sense this case contains general language which may have a bearing on the decision, it remains that the facts upon which this case is based are entirely different from those of the instant case. There, a company offer- to buy pulp manufactured abroad from a New York broker who was a commission agent for foreign mills. The offer was cabled to the foreign mill, naming the purchaser. Upon acceptance, the broker informed the company and contracted with it in his own name, sending a copy to the mill providing for shipment from abroad during a specified period, and delivery to the United States. Upon receipt of shipping information, the broker relayed it to the company. The broker paid the mill as soon as he was advised of shipment, and the bill of lading was sent to him. Upon pulp arrival in Hoboken, New Jersey, the broker made [fol. 117] out bills of lading for shipment from that point to the company at Garfield, New Jersey. The Court pointed out that the broker acts only as an agent, and that in this case, there is a continuing intent that the pulp be transported from the steamer to Garfield, and the transportation is therefore a part of *Foreign* commerce. It will be observed that there are in this case none of the incidents found in film transportation and detailed above in the comments on the Standard Oil Case.

It will also be observed that in the *United States vs. Erie R.R. Case*, supra, there was no distribution of the pulp involved nor stoppage of the shipment except momentarily for rebilling at Hoboken, New Jersey, where the same broker that had imported the shipment of pulp and had paid the steamship transportation charges, appeared and rebilled the shipment to Garfield, New Jersey, and paid the added transportation charges, a clear and unequivocal example of a continuous movement under a common arrangement and almost identical with the facts in the leading case of *B. & O. R. S. W. Co. v. Settle*, 260 U. S. 166. In both cases, a rebilling arrangement was attempted in order to defeat a through rate. Neither case has any facts in common with the instant case.

The opinion further points out that Elliott S. Windward of RKO Pictures, Inc., testified that the film distributor exercised control over the carrier employed to transport the film from the exchange to the theater-exhibitor. Reference is made in the opinion, and in support of such contention, to the testimony at page 50 of the Record, wherein Mr. Windward does state that the Carrier must be properly bonded and insured. It is upon this factual premise, apparently, that the Court concludes there is a retention of control over the entire journey of the film transport within Utah, and that because of this control, the film could not be said to have come to rest at the exchange. As has been [fol. 118] detailed above, in the first assignment, all witnesses testified that the selection and payment of the local film carrier is left within the control of the theater-exhibitor. An examinatioin of Mr. Windward's testimony at the same page (50) of the Record clarifies this, particularly the following language:

> "Q. Who determines which method of transportation will be employed?
> "A. The Exhibitor."

Witness McMahon of Republic Pictures also clarifies it at page 61 of the Record:

> "Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?
> "A. The exhibitor enters into the agreement with the common carrier—we don't."

Witness Walker of 20th-Century Fox also clarifies it at page 71 of the Record:

> "Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?
> "A. It is between the exhibitor and carrier."

In view of the repeated assertions of the Record in regard to this, it would seem obvious that there is a misconception of the actual facts of this local carriage, and that what Windward did say was that the exhibitor should select

and make the transportation arrangements with any qualified carrier.

[fol. 119] Following this factual assertion, the opinion again points out that the contracts contemplated a continuous transportation of film, and cites in support of such conclusion four cases, including *Republic Pictures Corporation* v. *Kappler*, 151 F. (2nd) 543, hereinafter called the Kappler Case. This case concerned an action brought by an employee to recover for overtime pay under the provisions of the Fair Labor Standards Act, and upon the theory that the business in which his employer was engaged was in interstate commerce.

Kappler was employed by Republic Pictures Corporation at the Des Moines distributing office, which agency handled films to points both in the State of Iowa and outside of that state. This employee was a booker concerned with the booking of the films. He also contacted the transportation companies and other agencies to whom the films might be delivered for transportation. The Court concluded that this employee's services were essential and that he was engaged in commerce, the word used in the Fair Labor Standards Act, and the principal part of his activities were in such employment. This case is clearly inapplicable so far as the facts are concerned. In the first place, the Court was concerned with a definition of the term "in commerce" as set out in the Fair Labor Standards Act of 1938. The definition of commerce from Section 3 of the Act is set forth in the opinion at page 544, as follows:

> "Commerce means trade, commerce, transportation, transmission or communication among the several states, or from any state to any place outside thereof."

The same section of the Act also provides:

> "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, [fol. 120] transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

As the Court pointed out, and it seems obvious from the pertinent provisions of the Fair Labor Standards Act, the

problem is not strictly a definition of interstate transportation in the sense with which we are concerned, but is in reality much broader, and in fact a definition of an interstate business. This distinction was specifically pointed out by the Court in the First *Standard Oil Case*, supra. The opinion in the *Kappler Case* further states, at page 545, that plaintiff's contacts with and participation in interstate commerce were substantial, which apparently is sufficient for purposes of the Act. This might well have been the case, since a generous portion of his time was devoted to the shipment of films outside the state of the exchange, which would clearly be in interstate commerce. It should also be noted that this employee contacted the transportation companies to whom film was delivered. Whether or not the Court had in evidence the Republic Picture contract received as plaintiff's Exhibit I in this case cannot be determined, but in view of the language, this seems entirely possible. As we pointed out in the factual analysis in Assignment I, the Republic contract in this regard is different from at least one other major film distributor, and if it be concluded that it gives the distributor the right of control over the local transportation, is contrary to the testimony of every witness in this case who testified on the subject. For these reasons, it is submitted that the *Kappler Case* is not authority for the conclusion of the Court that under the facts of this opinion, there was a contemplated and obligated continuous transportation of film from distributor to exhibitors and back.

[fol. 121] The second case cited by the Court as additional authority for the same conclusion is *Beggs* v. *Kroger Co.*, 167 F. (2d) 700. In this case, defendant Kroger Company operated retail food stores in Arkansas, and maintained a warehouse at Little Rock through which merchandise sold in the retail stores passed. Substantially all of the merchandise received at the warehouse was from without Arkansas. It was unloaded, placed in the warehouse, sorted in lots, and then distributed to the various company-owned stores in Arkansas in company owned trucks. The warehouse was merely a repository of the merchandise beside the railroad yards until the trucks could move it

to the stores. The drivers of the trucks claimed pay and hours of labor under the Fair Labor Standards Act, and the question arose as to whether or not these drivers were subject to this Act or to the Motor Carrier Act of 1935.

The Court held that these drivers were engaged in an interstate transportation, the regulation of which had been given to the Interstate Commerce Commission, because the warehouse, like any railroad warehouse, was merely an instrument of transportation facilitating the transfer of the merchandise from rail carrier to motor carrier. The facts, moreover, are distinctly different from those of film transportation, and there was no selection of carrier by the consignee, nor actual processing of the goods in the warehouse, except as a divisional matter, and no booking negotiations, or trade screenings or sales of film. The entire movement was clearly subject to the control of, and actually made by, the Kroger Company.

The motion picture exchanges in Salt Lake City are definitely not instrumentalities of transportation, and are not merely warehousing organizations. They are distribution centers for national distributors of films and their activities must be appraised under Court decisions applicable to distribution. It is respectfully submitted that this decision is not authority for the conclusion reached by the Court, based upon the facts of film transport as evidenced by the Record.

[fol. 122] The opinion likewise cites a third case of *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, to the point that a convenient intermediate halt in a movement of goods in process of getting them to their final destination, leaves such goods "in commerce" until they reach that destination. This case, like the Republic Pictures Corporation case, arose under the provisions of the Fair Labor Standards Act, and was a suit brought by the administrator of the United States Department of Labor to restrain violations of the Act. As the Court pointed out at page 567:

> "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

The Court in emphasizing the broad aspects of the Fair Labor Standards Act quoted the remarks of Senator Borah respecting jurisdiction under the Act, page 567:

> "If the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of the carrying on of that business are within the terms of this bill, and, in my opinion, are under the constitution of the United States."

Moreover, in the *Republic Pictures* v. *Kappler Case*, supra, the Court stated in substance that the applicability of the Act, (Fair Labor Standards Act) is dependent upon the character of the employee's work and if a substantial part of that work is related to goods moving in part or entirety in interstate commerce, the employee is covered by the Act. It would again seem that the Court is engaged with a determination of the existence of an interstate business, and is applying standards set forth in the Fair Labor Standards Act itself. The facts, moreover, were concerned with what might be described as a general paper brokerage business. Again, there is nothing to indicate active [fol. 123] processing of the goods, or other of the distinguishing incidents of film transportation which have been repeatedly detailed above. As a matter of fact, the Court determined in this case that interstate transportation terminated before resale and that further transportation within a state was intrastate transportation.

The fourth and last case cited in the opinion of the Court is *Transway, Inc.* v. *Exhibitors Delivery Service, Inc.*, 51 M. C. C. 263 known as the *Transway Case* decided February 2, 1950, by the Interstate Commerce Commission. We have no argument with this case. It supports our contentions throughout this petition and brief.

The Transway Case held that the transportation of newsreels between points wholly within the State of Louisiana was interstate transportation for the reason that the *newsreels*, like newspapers, are good for a very limited period, generally thirty days, and it is essential to arrange in advance for the exact dates on which exhibitions thereof are to commence, and the exact theater destinations. The contracts between the film companies and theater-exhibitors

respecting newsreels cover a period of fifty-two weeks each year and provide for the delivery of one or two newsreels each week and specify the *exact* days of each week for delivery of the newsreels at named theater destinations. These contracts are made prior to the delivery of any newsreels and approved by the National offices of the film distributors, and thereafter the only duty of the local film exchange is to draw a chart or schedule of deliveries of the newsreels from these contracts and see to it that films [fol. 124] are delivered directly to the destinations named in the contracts on the exact days named in the contracts. The case makes a specific point of these facts and the added fact that no newsreels are stocked in the vaults of the branch exchange offices at any time. Newsreels do move in an almost continuous circuit during the thirty days of showing, and thence back to the exchange, and back to the laboratories for junking.

The Commission said:

> "Newsreel prints are shipped to New Orleans pursuant to a preconceived intention to move all of them to various exhibitors and from one exhibitor to another in Louisiana * * * in conformity with contracts previously entered into, which, as noted, provide for the dates on which the contracting exhibitors were to show the newsreels."

The Commission held that at the time the newsreels were shipped from out-of-state points to New Orleans there existed a contractual obligation to see to it that the newsreels were delivered at named theater-exhibitor destinations on exact named dates. In fact, as brought out in the instant case, newsreels often are shipped direct from out-of-state points to the first theater-exhibitors rather than to the exchange and from thence to other theaters.

If reference is made to page 7 of the Record herein, it will be found the appellees, defendants below, admitted the interstate character of newsreel transportation where they are handled in the same manner as set forth under the factual statements in the *Transway Case*, as follows:

> [fol. 125] "If plaintiff intended to state, 'That the transportation of motion picture newsreels has been

designated by the Interstate Commerce Commission as being interstate "in character",' then defendants will admit that the Interstate Commerce Commission has so held where the facts underlying said interstate transportation of newsreels are identical with the facts set forth in the case decided by the Interstate Commerce Commission known as Transway, Inc. v. Exhibitors Delivery Service."

Also it should be observed, since the Court herein has cited the *Transway Case* as authority for the opinion herein, that the Interstate Commerce Commission in deciding the *Transway Case*, confirmed its own decision in a former case known as *Film Transit Case*, (7 Motor Carrier Cases 485). The *Film Transit Case* had to do with the transportation of *all types of motion picture film* from distributor exchanges located in Memphis, Tennessee to theaters in Tennessee. The facts stated in the *Film Transit Case* are almost identical with the facts in the instant case except for exchange screening of pictures before sale, and the Commission at page 496 of the report (Motor Carrier Cases) stated:

> "It does not appear that any particular print is earmarked for delivery to any particular exhibitor or group of exhibitors. While the contracts with the exhibitor for the showing of the prints (films) are usually made sometime prior to their receipt at Memphis, the respective dates on which they are to be shown by the several exhibitors are fixed later, and in many instances after the arrival of the prints at Memphis. It is apparent, therefore, that when the prints reach Memphis from New York, that there is [fol. 126] no existing intention to move any particular print to any particular point or group of points beyond Memphis. Consequently, we are of the opinion that the transportation between Memphis and other Tennessee points over *intrastate routes is intrastate in character.*

"The Interstate Commerce Commission is not a judicial tribunal. However, the appellees and intervenors herein commend to the Court the decisions of the Interstate Com-

merce Commission in the *Film Transit Case* and the *Transway Case*, supra.

They are both sound, and founded upon well established principles of law relating to the question of inter-intrastate transportation, and are prepared by a Federal tribunal which has been dealing with Federal transportation problems for more than half a century. A careful reading of these two cases will give a clear and complete picture of the national and local film transportation problem.

Conclusion

In conclusion, it is respectfully submitted that the Court has misconstrued salient facts of transportation in the film industry, as evidenced in the Record, and has likewise determined the existence of interstate transportation upon the authority of a number of federal decisions which in actual fact are diametrically opposed to the conclusions reached in the opinion. For these reasons, and because of the far-reaching and significant nature of this decision, it is submitted that a rehearing should be granted to the [fols. 127-128] end that the decision of the District Court be affirmed, with the possible exception of the determination that the usual transportation of newsreels is intrastate commerce.

Respectfully submitted,

Of Counsel:

C. W. Ferguson, 314 State Capitol, Salt Lake City, Utah, Attorney for Appellees, Public Service Commission of Utah; Wood R. Worsley, Walker Bank Building, Salt Lake City, Utah, Attorney for Intervenor and Appellee, Joseph J. Milne Truck Line, Inc.; Rex J. Hanson, Continental Bank Building, Salt Lake City, Utah, Attorney for Intervenor and Appellee, Seamons Truck Line.

[File endorsement omitted.]

[fol. 129] SUPPLEMENTAL OPINION—March 19, 1952

Before Phillips, Chief Judge, Huxman and Murrah, United States Circuit Judges.

HUXMAN, Circuit Judge:

Appellees have filed a petition for rehearing on the ground as alleged therein that the opinion of the court misconstrues and ignores fundamental and controlling facts and that the opinion presumes and is predicated in part on the presumption "that the film is neither within the State of Utah nor released for exhibition to the public at the time the contract is executed." An opinion speaks for itself and the fact that it may be misconstrued does not ordinarily require an opinion in support of an order denying a petition for rehearing, but in this case we feel that a statement is warranted, not only because we feel that the basis of the opinion is misconstrued, but also because the petition for rehearing in setting out evidence, which it is claimed we ignored, perhaps inadvertently omits a part of the testimony of some witnesses which is essential to place such testimony in proper focus. To overcome the statement in the opinion that the distributors exercise control over the transporting agencies selected by the exhibitor to transport the film from the exchange to the theatre, petitioners quote the following from the testimony of Elliott S. Windward of R.K.O. Pictures, Incorporated:

"Q. Who determines which method of transportation will be employed?

"A. The Exhibitor."

For some reason petitioners overlooked the questions and answers which immediately follow the above question and answer, as follows:

"Q. Can you state whether or not your office exerts any control over what shipper will be employed? Must certain requirements be met by carriers for you to release films to it?

[fol. 130] "A. He must have the proper credentials involving insurance and protection of the prints

while in his possession; he must be a licensed carrier, and *he must also be approved by our home office.*

"Q. The home office requires approval?

"A. Yes."

But whether the distributor exerts or fails to exert supervision over the carrier delivering the film from the exchange to the exhibitor's theatre was but one factor considered in the opinion. It is neither possible nor wise to set out in detail all the evidence upon which the court's conclusions are based. There is much criticism by the legal profession that opinions are too long and detailed and thus unduly encumber legal publications with matter that is of no subsequent value.

The basis of our opinion is that if there is a continuing intent that these films shall be transported until they reach their journey's end from whence they started, the entire journey is a continuing one, notwithstanding that there may be a temporary stoppage in transit for some particular purpose or purposes. We think the decisions by the Supreme Court cited in the opinion support this statement of the law. We are still of the view that when this yardstick is laid along side of the basic facts in the case they support our conclusions.

The opinion does not assume, as stated in the petition for rehearing "that the films are sent to the theatre exhibitors upon a completely pre-determined schedule." On the contrary, as pointed out, the opinion is predicated on the ground that the contracts between the distributor and numerous exhibitors all contemplate that a film will be sent from the distributor to the exchange and there will be delivered to an exhibitor and by him in turn be delivered to the next selected exhibitor and so in turn to all the exhibitors, until the last exhibitor by his contract is obligated to return it to the exchange.

Neither do we think the record sustains the point petitioners make that contracts for a film are not made until the film arrives at the exchange and the exhibitor has had an [fol. 131] opportunity to screen or see the film. Such a conclusion would mean that a separate contract would be executed with respect to each film, selected only after the film had reached the exchange and had there been viewed

by the exhibitor. We think the record is without dispute that most, if not all, contracts are contracts covering a considerable period of time; that in many instances they are made before the film has been completed and at least before it is ready for delivery for exhibition and that they are executed prior to the time the exhibitors see any particular film or before the film has reached the exchange in Salt Lake City.

It is without dispute that all of the distributors have salesmen who go out in the territory and solicit business. They have no power to make a binding contract. All proposed contracts must be submitted to the distributor for approval. Thus, Wade, Representative of Universal International Film Exchange, testified that his company dealt in news reels and feature films; that sales representatives covered the territory, contacting the individual theatres for the sale or licensing of the films; that they wrote up the contract, submitted it to him and that he in turn submitted it to the home office and that this procedure applied to every subject. He testified that not all the films covered by the contracts were in his possession when it was executed; that the contracts were made prior to the actual shipment from the laboratory to him; that in many instances the film had not yet been produced when the contract was made. He testified further from his personal knowledge and experience that other exchanges handled the distribution of film in the same manner.

Windward, R.K.O. Representative, testified that there were different procedures for bookings; that salesmen secured a date and submitted it to the office; that the local office had no power to make a contract; that only New York had that power and that the home office also determined the play date of a picture. Walker, Branch Manager for Twentieth Century Fox, testified that on short subjects they wrote a contract on the basis of a year covering the entire product; that the March of Time was sold on a yearly basis and that such contracts are generally executed prior to the [fol. 132] production of the subjects concerned therein. He did testify that they seldom solicited an account on feature products until they first had a trade showing, but his testimony makes it clear that the film in such cases had not come to rest so as to terminate the interstate transportation

thereof; that at these trade showings there was present only one print. It is clear from his testimony that such print was not there for delivery to a purchaser, but only for exhibit to prospective purchasers. The record is devoid of any evidence showing that the distributors accumulate a stockpile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you do when you go to a retail merchandising store.

We adhere to our conclusion that the record makes it clear that the contracts between all the exhibitors and a distributor contemplate a continuing movement of a film from the distributor through the exchange to all of the exhibitors and from the last exhibitor back to the distributor from whence it came, interrupted only temporarily at the exchange for purposes of mutual benefit to all the parties.

The petition for rehearing is denied.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING.—March 19, 1952.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

On March 31, 1952, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days from that day under provision of paragraph 3 of rule 28 of said court.

[fols. 133-134] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 135] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 741

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed June 9, 1952.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. Counsel are requested to discuss on briefs and oral argument the question whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 741

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1952

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SUPREME COURT

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON and W. R. McENTIRE,

Petitioners,

and

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINE, and JOSEPH J. MILNE TRUCK LINE, INC., a corporation,

Petitioners,

vs.

WYCOFF COMPANY, INCORPORATED, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

C. W. FERGUSON,
Attorney for Petitioner,
Public Service Commission of Utah

WOOD R. WORSLEY,
Attorney for Petitioner,
Joseph J. Milne Truck Line, Inc.

REX J. HANSON,
Attorney for Petitioner,
Seamons Truck Line

D. A. SKEEN,
Attorney for all Petitioners.

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In the Supreme Court

of the United States

OCTOBER TERM, 1952

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON and W. R. McENTIRE,

Petitioners,

and

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINE, and JOSEPH J. MILNE TRUCK LINE, INC., a corporation,

Petitioners,

vs.

WYCOFF COMPANY, INCORPORATED, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

---

Petitioners, Public Service Commission of Utah, Hal S. Bennett, Stewart M. Hanson, W. R. McEntire, and Melva Seamons and Roy Hill, d/b/a Seamons Truck Line, and Joseph J. Milne Truck Line, Inc., a corporation, pray that a Writ of Certiorari issue to reverse the judgment of the United States Court of Appeals for the Tenth Circuit, and the judgment denying petition for rehearing therein, the judgment having been entered in the above

entitled case on December 19, 1951, the order denying petition for rehearing having been entered on March 19, 1952, and the order staying mandate having been entered March 31, 1952.

Opinions Below

The decree of the District Court is set forth in the record at page 22. The opinion of the Circuit Court of Appeals is set forth in the record at page 87, and the supplemental opinion at page 129. These opinions have not as yet been published in the Federal Reporter.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 19, 1951 and order denying petition for rehearing was entered on March 19, 1952, and an order was entered staying the mandate for thirty (30) days from March 31, 1952. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254 (1).

Question Presented

Whether the transportation of motion picture films between points and places wholly within the State of Utah is in interstate commerce.

Statement

The QUESTION PRESENTED and the litigation to determine it grew out of a dispute between WYCOFF COMPANY, INCORPORATED of Salt Lake City, Utah, a motor common

carrier of motion picture film, on the one hand, and THE PUBLIC SERVICE COMMISSION OF THE STATE OF UTAH upon the other. Briefly stated, Wycoff Company, Incorporated, had been transporting film *intra*state within the State of Utah for several years under certificates of authority granted by the Utah Commission. Suddenly, after being refused certain added authority by the Utah Commission, the Company decided that all motor carrier transportation locally between motion picture theatres and exchanges wholly within Utah, was in *inter*state commerce and not subject to the jurisdiction of the Utah Commission, and commenced operations between points wholly within Utah despite the refusal of the Utah Commission to grant authority to do so. Thereupon the Utah Commission brought an injunction action in the State Court to enjoin the operations of Wycoff Company, Incorporated. Immediately, the Company instituted an injunction proceeding in the United States District Court to prevent the Utah Commission from interfering with its local hauling operations. The Company alleged its operations were in *inter*state commerce and not subject to the jurisdiction of the Utah Commission.

The specific facts related in the District Court below, underlying the QUESTION PRESENTED, are briefly as follows:

Motion picture film is sent by national film distributors from laboratories in New Jersey, New York (R. 46), or California (R. 49) to their Salt Lake City, Utah, branch exchanges for distribution to theatre exhibitors within Utah, as well as in other intermountain states. The chief concern herein is with film transportation wholly between points located in Utah.

Raw film stock is shipped from the laboratories in pasteboard cartons (R. 57), each of which contains a num

ber of 1,000 feet lengths (R. 28, 39, 64), the number being dependent upon the number of assembled prints desired by the Salt Lake exchange. After arrival of this raw film at the Salt Lake exchange, it is inspected, assembled into 2,000 foot rolls, additional strips of film known as heads and tails are placed on each of such rolls for projection convenience, and the film is then wound on metal reels (R. 28, 39, 40). The reels are then placed in metal containers and stored in vaults to await booking* and subsequent distribution to theatres (R. 40, 62). The purpose of this local processing is to minimize transportation costs from laboratory to Salt Lake exchange, and serve the business purposes of the distributors, and has no relation to Utah reshipment in a transportation sense. The film cartons received by the exchanges in Utah cannot be transported direct to theatre exhibitors in Utah or even within Salt Lake City, Utah, in the form in which they reach this state (R. 39). Furthermore, in many instances the films even after being processed as aforesaid cannot be shipped and transported locally to theatre-exhibitors in Salt Lake City or other places in Utah until after local trade screenings**, and the dates of showing of the pictures have been agreed upon under booking procedure (R. 51, 52, 54, 64).

The film exhibition is under a specie of licensing contract between the film-distributor and the theatre-exhibitor. These contracts are executed in Utah subject

*Booking is a term used by motion picture distributors and exhibitors as a name for the procedure followed by local film exchanges wherein dates for showing of pictures at the many theatres are registered as between the exchanges and local motion picture theatres (See paragraph fifth of Plaintiffs exhibit No. 1, R. 79).

**Trade screening is a term used to name an established practice whereunder films are shown to prospective theatre-exhibitor-buyers.

to the approval of the distributor's New York offices. At time of execution, the date on which a film will be shown at a particular theatre is neither inserted nor established (R. 40, 41, 60, 71). In some instances these contracts are executed while the film is outside Utah, and in many other instances after it is physically in Utah, and frequently after it has been in storage in such state for an appreciable period of time. After film arrival, processing and storage at the Salt Lake exchange, a trade screening for the benefit of local exhibitors is arranged. Subsequent to this, and for the first time, the exact date on which the film will be shown at any theatre is established (R. 64). It is not until this, or a later time, that the date is established on which a particular film will subsequently be transported to any given Utah theatre. It is believed that this local film transportation in Utah is, in essence, the same as that of any typical commodity distribution system utilizing regional offices.

The *transportation* contracts or arrangements with local carriers are entered into and paid for by the local Utah theatre-exhibitors. The selection and control of the local carrier by the local theatre-exhibitor in most instances is a right granted by the film distributors in the contract of exhibition (R. 79, 81). In most instances the film is transported from Salt Lake City, Utah, to other Utah points for exhibition, and then returned to the Salt Lake City exchange for inspection and either storage or further transportation. In some instances it is circuited in rotation from the initial theatre to other theatres within an area before such return to the exchange (R. 37, 61).

From the Salt Lake exchange, films are also shipped to points in other intermountain states. Also in some instances *news reels* alone are shipped directly from out-of-state laboratories to Utah theatres. The transportation

character of such shipments is not in issue, as it is clearly interstate in character. It is of interest, however, because it indicates a possibility that the judgment of the United States Court of Appeals is founded upon a confusion between the over-all interstate nature of the business of film distribution, and the *intra*state nature of the film transportation between Utah points. The distinction has been repeatedly recognized by the decisions of this court and other federal courts in cases whose facts, though not involving films, are in substance similar to the instant case. *Atlantic Coast Line R. Co. vs. Standard Oil Company,* 12 F. (2d) 541; *A.C.L.R.R. vs. Commission of Georgia,* 281 Fed. 321.

In addition, it is clear that the film comes to rest at the Salt Lake City distributing office for processing and/or storage for reasons which are solely to meet the business convenience of the distributors, and which have no necessary relation whatsoever to the film transportation from the exchange to Utah theatres or return. See *General Oil Company vs. Crain,* 209 U.S. 211; *B. & O. vs. Settle,* 260 U.S. 166.

It is, moreover, noted that at the time the raw film arrives in Utah, the cardboard cartons contain sufficient film to meet the demands of the entire area of distribution embracing several states, and therefore this film could not be destined as a single shipment to any single theatre-exhibitor in Utah as the final destination. This would indicate that the instant case falls clearly within the doctrine of *Atlantic Coast Line R. Co. vs. Standard Oil Company,* 275 U.S. 257. In that case Standard Oil maintained Florida storage facilities for oil products shipped to that state from other states and foreign countries. From Florida the company reshipped these products to local bulk sta-

tions in Florida which, in turn, shipped to consumers by tank wagons. In some instances service stations were supplied with gasoline directly from the main storage facilities. Most of the product was sold under contracts executed before oil arrived in Florida. Also at the time the oil first entered the state it could not be determined where any particular cargo, or part of such cargo, would go, or when it would be shipped. The Supreme Court held that the movement of oil from the main storage facilities to other points in Florida was transportation in intrastate commerce. The instant case of film transportation falls clearly within the doctrine announced in the Standard Oil case.

The film transportation wholly in Utah is not pursuant to the original transportation contract by which the films reached the Salt Lake City exchange, nor is it pursuant to any terms of the original exhibition contracts. The local transportation of film is undertaken pursuant to an entirely separate and distinct contract of transportation between local carrier and local theatre effected subsequent to film arrival, processing, and storage in Utah (R. 50, 61, 71). This is merely one additional factor indicating the break in transportation from the film laboratory in New York to the ultimate Utah theatre-exhibitor. This court has consistently held that when any commodity transported in interstate commerce has reached the destination of its journey and has been delivered by the carrier to the consignee, it ceases to be a matter of interstate commerce, and subsequent movements, especially those necessary for legitimate distribution from the point at which it has been delivered, to other points in the same state, are *intra*state transportation. *Coe vs. Erroll*, 116 U.S. 517; *C.N.O. & T.P.R.R. vs. I.C.C.*, 162 U.S. 184; *I.C.C. vs. B.Z. & C.R.R.*, 77 Fed. 942; *U.S. & I.C.C. vs. Chicago K. & S.P. Company*,

81 Fed. 783; *Boyd vs. U.S.*, 275 Fed. 16; *Brown vs. Houston*, 114 U.S. 622; *Pittsburgh Southern Coal Company vs. Bates*, 156 U.S. 577; *Chicago, Milwaukee & St. Paul R.R. vs. Iowa*, 233 U.S. 334.

The District Court held (R. 22) that the transportation movement of films within Utah is *intra*state in character and subject to the jurisdiction and control of the Public Service Commission of Utah. Nevertheless, in the opinion below and the supplemental opinion denying the motion for rehearing, the Circuit Court of Appeals has reversed the District Court and held that such film transportation is *inter*state in character.

Specification of Errors to be Urged

The Circuit Court of Appeals, Tenth Circuit, erred:

1. In holding that film transportation between points and places wholly within the State of Utah is interstate in character and therefore not subject to the jurisdiction of the Utah Public Service Commission, contrary to and in direct conflict with rules of law established by the United States Supreme Court and various circuit courts of appeal as hereinafter pointed out.

2. In reversing the order of the District Court.

Reasons for Granting the Writ

1. The decision in this case is of the utmost importance, not only because it directly affects the scope of regulatory jurisdiction of a sovereign state heretofore exercised without question for several decades, but also, because the decision will unsettle important and commonly accepted distribution-transportation practices and principles established and followed for many years by shippers,

forwarders, distributors and carriers throughout Colorado, Wyoming, New Mexico, Kansas and Oklahoma, as well as the balance of the United States. It will unquestionably divest several hundred certificated intrastate motor carriers, now operating within the six western states composing the Tenth Circuit, of a major portion of their traffic, and thereby divest them of vital annual operating revenues heretofore enjoyed by them and recognized as rightfully theirs. This loss of traffic and revenues obviously will render the intrastate operating rights of these carriers eventually worthless and bring out general bankruptcy among many of these carriers for the decision herein will not only be applicable to motion picture film, but also to commodities generally distributed by national manufacturing and producing industries locally within states. It is difficult to conceive of a single industry operating upon a national scale that does not intend that the commodities they ship to their various state distributors shall ultimately be transported to dealers or exhibitors at final destinations within each state. In most instances this type of distribution within a state has long been accepted as intrastate transportation, subject to state regulation.

Unquestionably the decision herein will have a highly detrimental and damaging effect upon the businesses and industries of many people far beyond the interests of the immediate parties involved. We feel that we are not only representing our clients' interests in urging this petition for rehearing, but that we are also representing important principles affecting many people. As Chief Justice Fred M. Vinson noted in his recent address before the American Bar Association, "You represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a

great many people throughout the Country."

2. The decision of the Circuit Court of Appeals, Tenth Circuit, is contrary to and in irreconcilable conflict with, the rule of law that *intention alone cannot convert what is essentially intrastate transportation into interstate transportation*, established by the United States Supreme Court, and other Federal Courts in, among other cases: *Atlantic Coast Line R. Co. vs. Standard Oil Company*, 275 U.S. 257; *General Oil Company vs. Crain*, 209 U.S. 211; *Atlantic Coast Line R.R. vs. Standard Oil Company*, 12 F. (2d) 541, (Cert. Den. 273 U.S. 712); *Southern Pacific vs. Arizona*, 249 U.S. 472; *B. and O. vs. Settle*, 260 U.S. 166.

The Circuit Court of Appeals, Tenth Circuit, in holding that transportation of motion picture film between points and places wholly within the State of Utah is in interstate commerce, based its opinion upon *United States vs. Erie R. Co.*, 280 U.S. 98. As the judgment states (R. 89): "If there is a continuing intent that goods shall be transported until they reach a designated place, the entire transportation is a continuing one notwithstanding that there may be a temporary stoppage enroute for a particular purpose."

The rule in the Erie case supra, grew out of a situation where an importer-broker, making all transportation arrangements covering a shipment of wood pulp from a foreign port to Hoboken, New Jersey, and thence to Garfield, New Jersey, by rail, rebilled the shipment at Hoboken as an *intra*state shipment to avoid the higher *inter*state freight rate. The shipment of wood pulp was in continuous movement under a common arrangement from the foreign port direct to Garfield, New Jersey, via Hoboken, with a stop only long enough to rebill, and

with no distribution involved, nor any splitting of the shipment or package into smaller lots. There was no question but that the entire shipment would go from one consignor to one named consignee, nor was there any storage to await determination of destination, as is the case with film. There was no storage to await negotiations with ultimate consignees, as there was in the instant case, nor was there any necessary processing to enable use of the product by ultimate consignees.

In film handling, despite the fact that all of the particular purposes mentioned in the foregoing paragraph made stoppage of film necessary at local Utah exchanges established for distribution of motion pictures, the Circuit Court of Appeals in net effect held that the *intention alone* that the films would eventually be sent on to local Utah theatres was sufficient to establish the character of the local transportation between the Utah exchange and theatres wholly in Utah as being interstate. It is most obvious that such a decision is irreconcilably in conflict with the long established rule that intention alone, (continuing or otherwise) cannot convert what is essentially intrastate commerce into interstate commerce. Thus in *B. & O. vs. Settle*, 260 U.S. 166, at page 173:

> "The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not deemed part of it, *even though some further shipment was contemplated when the original movement began.* Shipments to and from distributing points often present this situation."

And in *Atlantic Coast Line R. Co. vs. Standard Oil Company*, 12. F. (2d) 541 (Fourth Circuit), (Cert. Den. 273 U.S. 712) at page 547:

"The argument that complainant had in contemplation the shipments to its substations at the time of transportation to Wilmington, and that therefore, the shipments from Wilmington constituted one movement with the interstate shipment to that point, has an element of plausibility, but it is answered by the distinction drawn by Justice Brandeis in the *Settle Case*, to which we have just adverted. And that intention to make further shipment cannot convert what is essentially an intrastate shipment into interstate commerce has been expressly adjudicated by the Supreme Court in another case. Southern Pacific Co. vs. Arizona, 249 U.S. 472, 39 S. Ct. 313, 63 L.Ed 713."

Attention is especially invited to Southern Pacific vs. Arizona, supra, which is practically on-all-fours with the instant case. A brief comparison of facts generally should, therefore, be in order. In the instant case, film is shipped from outstate points for ultimate showing in Utah. In the Southern Pacific case, a show or carnival left El Paso, Texas, eventually intending to reach Bakersfield, California, and to show at many places in Arizona. The local movement of film in the instant case is all on local independent billing. The movement of the show in Arizona was also on local independent billing. In the instant case the film is intended to be transported to theatres in Utah, and then eventually go back to out-of-state points for ultimate destruction and salvage. In the Southern Pacific case it was admitted that the show started in El Paso, Texas, and eventually intended to move to other points in Arizona, and then proceed to California. Southern Pacific contended that movements by rail between points wholly in Arizona were in interstate commerce, because the show intended a continuous tour from El Paso, Texas to California, and

that transportation rates were not subject to jurisdiction of Arizona Corporation Commission, the utility regulatory body of that state. The Circuit Court of Appeals in the instant case held that all transportation of film locally between points and places wholly within Utah is interstate in character because there is a continuing intent that the films be transported until they reach their eventual journey's end.

The Supreme Court, however, in Southern Pacific Co. vs. Arizona, supra, held that mere intention of the shipper to ultimately continue the tour of the show beyond the State of Arizona did not convert an intrastate movement into an interstate movement, and that therefore the local transportation of the show between local points in Arizona was subject to the jurisdiction of the Arizona Corporation Commission.

2. The decision of the Circuit Court of Appeals herein directly conflicts with the rule of law established by this Court relative to distribution as announced in *Liggett vs. Lee*, 288 U.S. 517; *American Steel & Wire Co. vs. Speed*, 192 U.S. 500; *Public Utilities Com. vs. Landon*, 249 U.S. 236; *General Oil Company vs. Crain*, 209 U.S. 211, which cases establish that goods, merchandise or commodities are not in continuous movement, or a part of a continuous movement, if they have reached any destination where they are *held for the business purposes and the profit of the company* such as distribution or storage rather than merely in delay as an accommodation to the means of transportation, or in a warehouse used as an instrumentality of transportation.

The Salt Lake City film exchanges are used by national film distributors as places of storage of films while await-

ing booking dates at the various theatres, as well as trade screenings and further disposition. The exchanges are also used as shops wherein raw films are inspected and repaired, supplied with heads and tails to facilitate their use in projection machines, and wound upon heavy metal reels to permit their use in theatre projection machines. The exchanges are also offices in which negotiations are made with local theatres respecting contracts and the showing of films, including establishment of showing dates and trade screenings.

It is almost inconceivable that the Circuit Court of Appeals should virtually determine that these exchanges were mere instrumentalities of transportation such as a warehouse in *Beggs vs. Kroeger Co.* (C.C.A. 8), 167 F. (2d) 700, wherein goods enroute to chain stores of Kroeger Company were unloaded in a warehouse beside the railroad track, where the goods remained only long enough for trucks to pick them up and haul them to the chain stores. There is, therefore, an irreconcilable conflict between the decision of the Circuit Court of Appeals, Eighth Circuit, and the instant decision of the Tenth Circuit. If the instant decision is allowed to stand, it will bring about confusion and irreparable damage.

3. The decision of the Circuit Court of Appeals herein directly conflicts with a rule of law of the Circuit Court of Appeals, First Circuit, that *the fact that a contract is likely to give rise to interstate shipments does not actually make the movements interstate.* In *Lipson vs. Socony Vacuum Corporation*, 87 F. (2d) 265, it was contended that because oil came into Massachusetts from outside the state to authorized distributors under long term contracts, movements wholly within the state were in interstate commerce. The Circuit Court of Appeals, First Circuit, held that

local movements of the oil within the state of Massachusetts were intrastate in character, and the fact that the contract covering sale of these shipments of oil was made prior to transportation of oil into the state, which were destined eventually to other points in the state, did not constitute the local movements as interstate in character. In the instant case the opinion of the Circuit Court of Appeals states, (R. 90):

> "Under the contract, both it (distributor) and the (theatre) exhibitor contemplated and understood that the film should continue in transportation until it reached the exhibitor's theatre. The distributor had a continuing interest in the transportation of the film beyond the exchange. * * * it cannot be said that the film came to rest at the exchange, as the term is understood, in order to end interstate transportation."

The above quoted portion of the opinion is in direct conflict with the decision of the Circuit Court of Appeals, first Circuit, in *Lipson vs. Socony Vacuum Corporation, supra,* and will result in confusion as to applicable standards to be used in distinguishing intrastate and interstate transportation.

Conclusion

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. W. FERGUSON,
314 State Capitol
Salt Lake City, Utah

Attorney for Petitioner,
Public Service Commission
of Utah

WOOD R. WORSLEY,
Walker Bank Building
Salt Lake City, Utah

Attorney for Petitioner,
Joseph J. Milne Truck Line, Inc.

REX J. HANSON,
Continental Bank Building
Salt Lake City, Utah

Attorney for Petitioner,
Seamons Truck Line

D. A. SKEEN,
Walker Bank Building
Salt Lake City, Utah

Attorney for all Petitioners.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of April, A.D., 1952.

.....

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BRIEF ON MERITS

No. 741

In the Supreme Court of the United States

OCTOBER TERM 1952

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON and W. R. MCENTIRE,

Petitioners,

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINE, and JOSEPH J. MILNE TRUCK LINE, INC., a corporation,

Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, a corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

C. W. FERGUSON,
Attorney for Petitioner, Public Service Commission of Utah

WOOD R. WORSLEY,
Attorney for Petitioner, Joseph J. Milne Truck Line, Inc.

REX J. HANSON,
Attorney for Petitioner, Seamons Truck Line

D. A. SKEEN,
Attorney for all Petitioners.

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BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 83-86) is reported at 195 F.2d 252 (C.C.A. 10); the supplemental opinion of the Court of Appeals (R. 114-117) is reported at 195 F.2d 255 (C.C.A. 10).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 19, 1951; the order denying petition for rehearing was entered on March 19, 1952; an order

was entered staying the mandate for thirty (30) days from March 31, 1952. The petition for a writ of certiorari was filed April 29, 1952, and was granted June 9, 1952 (R. 118). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether the transportation of motion picture films from film distributing offices in Salt Lake City, Utah, to points and places (theaters) within Utah and return, and between points and places (theaters) wholly within Utah, is transportation in interstate commerce and subject to the exclusive regulation of the Interstate Commerce Commission, or is transportation in intrastate commerce and subject to the exclusive regulation of the Public Service Commission of Utah.

2. Whether a single district judge had jurisdiction to hear and determine this case between a private corporation plaintiff and the Public Service Commission of Utah, an administrative agency of the State of Utah, defendant, in view of Section 2281 of Title 28 of the United States Code.

Statute Involved

Section 2281 of Title 28 of the United States Code provided as of the dates involved in this case:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard

and determined by a district court of three judges under section 2284 of this title."

Applicable Utah statutes are set forth in Appendix.

Statement

The complaint filed on October 10, 1950, in the District Court (R. 1) alleged, among other things, that respondent trucking corporation transported motion picture films under operating authorities granted by the Interstate Commerce Commission between Salt Lake City film distribution exchanges and points in Utah, Idaho and Montana, and that as to film transportation between points and places wholly within Utah the petitioner Public Service Commission of Utah was threatening to prevent such film transportation. The complaint sought a declaratory judgment that such Utah transportation was in interstate commerce, and further that the Public Service Commission of Utah be restrained from interfering with transportation over Utah routes authorized by the Interstate Commerce Commission (R. 1-3). The answer (R. 3) of the defendant Commission, among other things, admitted that it would attempt to stop such Utah film transportation insofar as such transportation was in *intra*state commerce. The District Court held that the transportation of motion picture film between points and places wholly within Utah was in intrastate commerce, and subject to regulation by the Public Service Commission of Utah, and that such Commission was not interfering with interstate commerce nor imposing any burden thereon, and denied the prayer of the complaint (R. 16-22). The Circuit Court of Appeals reversed this decision (R. 87), upon the ground that transportation of film wholly within Utah was in interstate commerce (R. 83-87), and denied petition for rehearing (R 117).

National motion picture film distributing companies maintain branch distributing offices in Salt Lake City, Utah, for film distribution to theaters in Utah as well as other intermountain states (R. 26). The film is sent to such branch offices from laboratories in New York, California and New Jersey (R. 49, 52).

The raw film (R. 27, 39, 40) is shipped to the branch exchange at Salt Lake City, Utah, in cardboard cartons, each of which contains a number of 1,000 foot lengths (R. 27, 40, 77), this number being dependent upon the number of final assembled prints desired by the Salt Lake City exchanges. After arrival of this raw film in Utah, it is inspected, assembled into 2,000 foot rolls, additional strips of film known as "heads and tails" are placed on each of such rolls to facilitate use in theater projection machines, and the film is then wound on metal reels (R. 27, 40, 41, 77). These reels are then placed in metal containers and stored in vaults at the exchange to await subsequent booking and distribution to theaters (R. 41). The term "booking" designates the procedure whereby the actual date for film showing is established between the exchange and the motion picture theater (R. 27, 42). A substantial number of reeled and processed films are held in the storage vaults either for time lapses between bookings or because there is at that time no booking for that particular picture (R. 57). It seems clear that the purpose of the Salt Lake City film exchange processing and storage is to meet the business purposes of the distributors, and as such has no relation to the transportation of the film, and is not a necessary incident of such transportation. The film cannot be shipped to theater exhibitors in Utah in the condition in which it is received at the exchange as it is not suitable for showing, and must be processed before projection (R. 40).

The film showing at the theaters is made under a specie of licensing exhibit contract, under film company copyright, between the distributor and the theater exhibitor (Ex. 1, R. 82A, 69, Ex. 3, R. 82C, 70), and while the contracts of the various film distributing companies are somewhat similar in nature, there is some variance as to the manner in which the contract is executed both as to the time of completed execution with reference to the presence of the film in Utah, and as to the type of film, as a feature, short, or newsreel.

Exhibition contracts in all instances are executed in Utah by the exhibitor and forwarded for final approval to the distributor's New York office. However, dates of delivery of films to theaters in Utah are not a part of the contract at time of approval, and distributor is not bound to make delivery at any certain theater on any certain date (R. 54, 55).

As to feature films, Universal International Film Exchange and Republic Pictures Corporation on new films or reissues execute the contract prior to the time of the film arrival in Utah as to 60% of the films, the contracts on remaining films being actually executed after film arrival in Utah (R. 41), but the contract at this point merely details the number of days of play, and does not specify either the date on which the film will be shown or the particular print which will be transported (R. 42, 55, 65). After the film has arrived in Utah and has been assembled and processed as above; booking arrangements are made and the date of showing at the particular theater and transportation is for the first time established (R. 42, 65). Moreover, these procedures are established on new films coming into Utah for the first time. Contracts on subsequent runs cover films in the storage vaults. On the

other hand, 20th Century Fox and RKO Pictures, Inc., do not execute the contracts and sell the pictures until after the film has been received in Utah, processed, and a trade screening has been held for the benfit of local exhibitors (R. 58, 71). The screening is an established practice whereunder films are shown to prospective theater exhibitor buyers. After they have had the opportunity to view the film, they then select those films desired for exhibit (R. 58, 71). In either event, it will be noted that the date on which the film is to be transported to the theater and the particular theater is not established until after films are processed and physically present in Utah (R. 77).

Short subjects are handled with a slight difference, in that they are purchased in blocks or groups for exhibition over a period of time as high as one year or more (R. 71), and in some instances may not have been produced at the time the contract of exhibition is initially executed (R. 71). Again, however, the booking of the specific date of showing is not agreed upon until after it has been processed and is actually present in Utah (R. 49, 77). Newsreel distribution is likened to a newspaper subscription (R. 29), and unlike the other films, in many instances may be shipped directly from the film laboratories outside of Utah directly to the theater (R. 77). In such case, newsreels are clearly transported in interstate commerce.

It will be noted that the contracts of exhibition themselves provide the manner (booking procedures) in which play dates of the films shall be established. Thus, in Section 7 of the Twentieth-Century Fox Film corporation contract (E. 3, R. 82 D, R. 70) it is provided that the film distributor shall mail to the exhibitor a written notice specifying the first date upon which such picture will become available for exhibition, at least fifteen days prior

to the specified date. Within fourteen days after such notice is mailed, the exhibitor selects an exhibition date within the period commencing upon the available date and ending thirty days thereafter, and notifies the distributor of his selection. If such date is acceptable to the distributor, it is confirmed in writing, or if not acceptable, the exhibitor is notified in writing of this fact, and the exhibitor and distributor attempt to agree on a mutually acceptable date, failing which the distributor sets the date. The Republic Pictures contract contains in substance the same selection of play date provisions in paragraph 5 (Ex. 1, R. 82B, R. 69).

After film arrival at the branch distributing office in Salt Lake City, it ultimately is transported to the theaters for exhibition, which movement may consist either of transport from the exchange to the theater and later direct return, or the film may be circuited between two or more theaters before such return occurs (R. 30). Wherever possible, however, the film, after showing in a theater, is returned to the exchange for inspection and checking before it is again routed to the next theater (R. 45, 66). Since the film exchanges serve several intermountain states from Salt Lake City, there will be instances of film transport from Salt Lake City or Utah points to a theater in other states and return. Such movement are clearly interstate in nature, beyond the issues of this case.

The transportation contracts or arrangements with local carriers for film transport within Utah are entered into and paid for by the Utah theater-exhibitors, who select the mode of carrier, usually either by trucking company, express or parcel post (R. 37, 43, 53, 66, 77). The distributor does require that the selected carrier have proper authority and adequate insurance, which is merely another way of saying that carriers must be approved regulated

carriers (R. 67). The contract of transportation within Utah is entirely separate and distinct, between different parties and covering entirely different lading than that under which the films originally reach Utah.

Finally, after the film has completed its useful life at the Salt Lake City exchange, it is removed from the reels, placed in metal barrels, and shipped to the laboratories for junking (R. 32, 58).

The testimony supporting all of the foregoing facts was adduced from witnesses called to the stand by the respondent itself in the District Court trial.

At the time the original complaint was filed on October 10, 1950, the Public Service Commission of Utah consisted of Hal S. Bennett, Donald Hacking, and W. R. McEntire. On August 27, 1951, by order of the Circuit Court of Appeals, (R. 83) Stewart M. Hanson was substituted in the place of Donald Hacking. W. R. McEntire died on June 3, 1952, and the same Donald Hacking was reappointed to the Commission by the Governor of Utah on June 12, 1952. So far as this case is concerned, the policy and attitude of the Public Service Commission of Utah has remained constant during all of this period and to the present time.

Specifications of Errors

1. The Circuit Court of Appeals erred in holding that the transportation of motion picture films from film distributing offices in Salt Lake City, Utah, to points and places (theaters) within Utah and return, and between points and places (theaters) wholly within Utah, is transportation in interstate commerce and subject to the exclusive regulation of the Interstate Commerce Commission.

2. While the Circuit Court of Appeals did not err in failing to require the convening of a three-judge court pursuant to Section 2281 of Title 28 of the United States Code, it did err in failing to dismiss the case in view of Utah statutes permitting judicial review of the orders and decisions of the Public Service Commission of Utah. (Consideration of error pursuant to order allowing certiorari, R. 118).

Summary of Argument

While a determination of whether the film transportation in this case, wholly between Utah points, is in interstate or intrastate commerce is essentially a factual consideration, in considering relevant authority it is necessary to distinguish between those cases which are concerned with the essential nature of the business involved, and those which involve the transportation incident to the business requirements. One class of cases defines interstate commerce from the standpoint of such federal regulatory acts as the Sherman Act, the Packers and Stockyard Act, or the various labor laws. Another class of cases defines interstate commerce for the purposes of rate making, local taxation, and regulation of transportation itself. The first class is in reality concerned with the essential nature of the business involved, while the latter class is concerned with transportation as such, and it is this class which controls the definition herein required. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F.2d 541, 547 (C. C. A. 4); *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 271; *General Oil Co., v. Crain*, 209 U. S. 211.

The Circuit Court of Appeals has not only overlooked pertinent facts of the case, but has confused this issue, as evidenced by citation of such cases as *Republic Pictures*

Corporation v. Kappler, 151 F. 2d 543 (C. C. A. 8), a case arising under the Fair Labor Standards Act, in support of the conclusions of the decision.

In determining whether a shipment moves in interstate or intrastate commerce, it is the essential nature of the transportation which controls. There are, however, a number of typical facts of marked assistance in reaching the proper conclusion, such as the intent of the parties, the manner and form of the transportation and other contracts involved, stoppage and the purpose of the same, alteration of the form of commodity, and destruction of the original package. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Company v. Crain*, 209 U. S. 211; *Southern Pacific v. Arizona*, 249 U. S. 472; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; *Nashville C. & St. L. R. Co. v. Wallace*, 288 U. S. 249.

In this case, raw film is shipped to the Salt Lake City exchange offices of the film distributors in cardboard cartons usually containing 1000 foot lengths. There it is inspected, additional film strips known as heads and tails are added, it is usually reassembled in 2000 foot lengths, wound on metal reels, and placed in storage vaults. It cannot be exhibited in the form in which it is received.

As to feature films, some distributors enter into contracts of exhibition prior to film arrival in Utah, which are a specie of licensing agreement wherein the theatre agrees to show the film. Other major distributors do not execute any contract of exhibition until after the film has arrived in Utah, and been screened by Utah theater owners. In all instances, however, it is not until after the film has arrived in Utah and been processed that the particular

date on which it will be shown and the particular print which will be used, is established by booking negotiations between the distributor and theater owner. As to shorts and serials, the procedures are essentially the same, except that the initial purchase may be in groups of pictures, some of which may not have been produced prior to contract. Newsreels are acquired in a manner similar to a newspaper subscription on a weekly or semi-weekly basis, and the film in some instances may go directly to the theater from out of state points. Newsreels alone, in such instances, would move in interstate commerce.

The film is utimately shipped from the distribution offices to the Utah theaters, or between Utah theaters by a carrier selected, contracted with, and paid by the theater owner. The film moves on an entirely different lading and carrier than the shipment initially into Utah, involving different consignor and consignee, and in a distinctly different package and form. Ultimately the film serves its purposes at the Utah exchange, and is, after a lapse of months or years, placed in metal barrels and returned to out of state laboratories.

There are two distinct transportation movements of film: the first from out-of-state points to the exchange at Salt Lake City, and the second a series of purely intrastate movements within Utah. Between these movements there is a substantial break, ranging from days to months or years. The purpose of this intervening period has nothing whatsoever to do with the requirements or necessities of transportation itself, but is solely designed to serve the business requirements of film distribution. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Co. v. Crain*, 209 U. S. 211; *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665.

Film transportation is in substance very similar to the transportation involved in a typical commodity distribution system. While it is true that the parties ultimately intend that the film will be used in theaters throughout Utah, there is no intent of a continuing movement which would blend the two transportation movements into one, which must be accomplished if the Utah transportation is to be deemed an interstate movement. This is particularly apparent where, in addition to the break set forth above, the original consignee distributor has nothing to do with selection, payment, and contract with the carrier who handles the Utah shipment, except to require that any carrier handling films be properly insured, and authorized by proper authority to transport the same. *Southern Pacific Co. v. Arizona,* 249 U. S. 472. The fact that film title remains in the distributor is immaterial to any issue in this case, as the licensee theater owner has possession and control of the film during the period in which transportation within Utah occurs, and commerce cannot be alternately described as interstate or intrastate simply because of the individual holding technical title.

In addition to a consideration on the merits, a jurisdictional question is presented.

This Court in the order allowing certiorari requested a discussion of whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code, which would require a three-judge court in the event the requested injunction was based upon the unconstitutionality of a state statute. No direct attack or reference is made in the pleadings to the unconstitutionality of a state statute. It is believed that this case is not one wherein the petition seeks an injunction on the ground of the unconstitutionality of a statute as applied, but rather upon the allegedly erroneous admini-

strative action under a state statute which itself is admittedly constitutional. In such case, a single judge may hear the petition. *Ex parte Bransford,* 310 U. S. 354, 358, 361; *Phillips v. United States,* 312 U. S. 246, 249.

As an ancillary consideration, however, it is apparent that the respondent had available and unused, adequate Utah procedure for review of any Commission order to preserve for ultimate review in this Court any federal questions arising out of such Commission order. As it is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states, the District Judge should have refused to take cognizance of this case. *Alabama Pub. Ser. Com. v. Southern R. Co.,* 341 U. S. 341, 347, 348, 350.

Argument

I

The issue in this case involves a determination of the nature of film transportation wholly within Utah, between the film distribution exchanges in Salt Lake City and theaters throughout Utah, and is not concerned with the essential nature of the business of distributing motion picture film from such exchanges to points in Utah and other intermountain states, which issue has been confused in the decision of the Circuit Court of Appeals.

The facts of film transportation in this case are relatively simple. Film is transported from New York, New Jersey or California to distribution exchanges at Salt Lake City, Utah, where the film is processed, and stored in vaults to await actual distribution. From this point the film is again transported either to other states in the intermountain territory or to theaters in Utah for exhibi-

tion. It may likewise be transported between theaters in Utah. From the exchange, interstate film shipments may be shipped to points in intermountain states other than Utah, but the concern here lies only with the transportation entirely in Utah, for it is this transporation that the Public Service Commission asserts is intrastate in nature, and, therefore, subject to regulation and control under appropriate Utah Law and authority.

In the concluding summary, the opinion of the Circuit Court of Appeals states (R. 86):

> "We conclude the parties to these contracts contemplated and obligated themselves to a continuous transportation of the film from the distributor to the various exhibitors and back to the exchange, interrupted only temporarily at the exchange for processing of the film and for allocation to the various exhibitors, and the entire transportation constituted interstate commerce."

Apart from the fact that such summary ignores undisputed facts in evidence such as the trade screening at Salt Lake City, Utah, in many instances, prior to contract of exhibition, booking arrangements after the film has arrived in Utah, the fact that the Utah transportation is between different consignors and consignees under entirely distinct shipping contracts, or the distinct change in the character of the local shipments of film as compared with the original package of raw film received at the exchange, it confuses the issue herein by failing to distinguish between the essential nature of the film distribution business and the essential nature of the transportation incident thereto.

There is a class of cases decided by this court, wherein the concern lies with the essential nature of a business, and

whether such business is in interstate commerce and thus within the purview of certain federal regulatory acts such as the Sherman Act, the Packers and Stockyard Act, or the various labor acts. On the other hand, there is another class of cases, which are applicable to the instant case, and which are concerned with a definition of interstate commerce for purposes of rate making, local taxation, and regulation of transportation itself. The distinction between a definition of the essential nature of a business and the essential nature of the transportation incident thereto has been repeatedly recognized.

Thus in *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F. (2d) 541, 547. (C. C. A. 4), the oil company shipped gasoline and oils from other states to its storage facilities at Wilmington, North Carolina. The oil company knew and intended that the gasoline and oil so shipped would later be distributed, and in fact, they were later distributed to customers in North Carolina. In holding that the latter shipments by way of distribution within North Carolina were in intrastate commerce, and subject to intrastate freight rates approved by the North Carolina Corporation Commission, the court stated, page 547:

> "Nor do we think that the cases of *Binderup v. Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308, *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A.L.R. 229, and *Swift & Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518, relied upon by defendants, are in point. These cases arose under the Sherman Act (Comp. St. Sec. 8820 et seq.) and the Packers and Stockyards Act of 1921 (Comp. St. Ann. Supp. 1923, Secs. 8716¼-8716¼z), and have nothing to do with the rates charged by carriers. That there is a difference in the principles applied to the two classes of cases is apparent at a glance. In the

one case it is the essential nature of the business which governs; in the other it is the essential nature of the particular transportation involved. If a group of merchants buying and selling goods in interstate commerce should conspire to raise prices, they would unquestionably be amenable to prosecution under the Sherman Act; but this would not authorize a transportation company to charge interstate rates on a shipment of goods which one of the merchants might make to another within the same state. As said by Judge Sibley in *A. C. L. R. R. v. R. R. Commission of Georgia,* (D. C.) 281 F. 321:

> 'While in the business of buying and selling goods, interstate commerce may reach all the way from first purchase to final delivery, interstate transportation for the purposes of determining the rate to be charged may have narrower limits.' Compare *Loewe v. Lawlor,* 208 U. S. at page 301, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, with *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.,* 249 U. S. at page 151, 39 S. Ct. 237, 63 L. Ed. 517."

This case was later approved in *Atlantic Coast Line R. Co. v. Standard Oil Co.,* 275 U. S. 257, 271, a case concerned with the status of transportation of imported fuel oil and gasoline by way of distribution from Port Tampa, Florida, to consumers wholly within Florida, in compliance with contracts made with consumers prior to shipment of oil and gasoline from foreign ports. At page 271 of the decision, this Court said:

> "We concur in the reasoning and conclusions of the United States Circuit Court of Appeals for the fourth circuit, in Atlantic Coast Line R. Co. v. Standard Oil Co., 12 F. (2d) 541."

The District Court below recognized the decisions of this Court as set forth in the two Standard Oil Cases, when it stated (R. 82):

> "I think the motion picture production business is interstate in character. I think the motion picture distribution business is interstate in character. But we are not concerned with that."

The logic of both Standard Oil cases is clear. The jurisdiction of the Public Service Commission of Utah is strictly confined to film transporation from the standpoint of proper control of the manner of transport operation and appropriate operating authority. It is not concerned with the application of labor or trust law, wherein the problem of definition is closely akin to the nature of the business on a broad and overall basis. We believe it apparent that the Circuit Court of Appeals has failed to make a distinction between the business itself and the transportation incident thereto, as it has cited (R. 86) as authority for its determination such cases as *Republic Pictures Corporation v. Kappler*, 151 F. (2d) 543, (C. C. A. 8), Aff. P. C. 327 U. S. 757, re. den. 327 U. S. 817.

Republic Pictures Corporation v. Kappler, supra, concerned an action brought by an employee to recover for overtime pay under the provisions of the Fair Labor Standards Act, upon the theory that the business in which his employer was engaged was in interstate commerce. Kappler was employed at a film distribution office in Des Moines as a booker, arranged showing dates, and also contacted the transportation companies and other agencies to whom the films might be delivered for transportation, either to points in Iowa or neighboring states. The court held that he was engaged in interstate commerce within the broad wording of the Fair Labor Standards Act,

and in so doing set forth a definition of the term "in commerce" as found in Section 3 of the Act, at page 544 of the opinion:

> "Commerce means trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof.
> * * *
>
> "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

As the court pointed out, page 545, the employee's contact with and participation in interstate commerce were substantial, and since his services were essential to the movement of commerce he was engaged in commerce within the meaning of the act. Inherent in the definition of the court were the duties of the employee in the general business in which he was engaged. Moreover, in the Kappler case, supra, the court cited as authority page 545, *Binderup v. Pathe Exchange*, 263 U. S. 291, which type of case was specifically distinguished in the Standard Oil case quotation set forth above.

Cases under the Fair Labor Standards Act are not analogous to the issues of film transport here involved, nor are those under the Sherman Act, for under such legislation the definition of commerce rests on the broad nature of the business, and may embrace for the purposes of such federal acts incidents of transportation which are in and of themselves intrastate for such other purposes as rate making or transportation control.

II

Whether transportation is intrastate or interstate is determined by its essential nature. The essential nature of the transportation of film wholly within Utah is intrastate in character for the reason that the original interstate package shipment of raw film upon arrival at the Utah exchange in Salt Lake City is broken, altered, processed, repackaged in several metal containers, stored and there held for the business purposes of film distribution; that thereafter independent local transportation contracts are executed between entirely different consignees and consignors; that the distributor is not bound as to the delivery of film until after the film is available or has come to rest in the storage vaults of the distributor in the Salt Lake City exchange ready for distribution in Utah; that no local transportation contract can be executed as between a Utah theater exhibitor and a local Utah carrier until the film is available in the Utah exchange, processed, stored and properly booked.

This Court has repeatedly held that the definition of a transportation movement must be determined by its essential nature. At the same time, however, there are a number of typical factors which are of marked assistance in making this determination, such as the intent of the parties, the manner and form of the transportation and other contracts involved, stoppage, alteration of the form of commodity, and destruction of the original package. *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257; *General Oil Company v. Crain*, 209 U. S. 211; *Southern Pacific v. Arizona*, 249 U. S. 472; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; *Nashville C. & St. L. R. Co. v. Wallace*, 288 U. S. 249; *B. & O. v. Settle*, 260 U. S. 166.

There is in this case a distinct break in the transportation movement which occurs after the film reaches the Salt Lake City exchange offices from the out-of-state

film laboratories. This pause or break, which may range from a few days to many months, is not occasioned by any requirements of transportation, but is solely to serve the business purposes of the film exchanges. Raw film reaches Utah in cardboard cartons containing 1000 foot lengths, the number of lengths being dependent upon the number of final assembled prints desired for the territory. After arrival it is inspected, additional film strips known as heads and tails are added, and the film is wound on metal reels, usually in 2000 foot lengths, placed in metal cans, and stored in vaults. The film cannot be exhibited by the theaters in the form in which it is initially received at the exchanges. The form of the commodity has, therefore, been substantially changed, and there is thereafter an additional necessary lapse of time before that film can be ultimately transported to a Utah theater. This additional lapse of time clearly serves the business needs of the film distributors. While in some instances prior to the time of arrival of the film in Utah, the Utah theatre has contracted to exhibit the film, nevertheless, the exact date on which such exhibition shall occur and the particular film which will be used are not determined until after the film is actually present at the exchange in Utah. The distributors are not bound by contract or otherwise, to deliver the film to any exhibitor until after it is available in Utah, and then only after a determination is made between distributor and theater exhibitors as to play date. Such arrangements are made in what is in one sense termed "booking," the purpose of which is to arrange suitable exhibition or play dates as between the various theaters served by the exchange. Since there are relatively few films available as contrasted to the number of theaters, such arrangement permits date allocation of the films. This procedure is true as to all types of films with the exception of some newsreels. Again, the delay between film arrival and

ultimate shipment has nothing whatsoever to do with any transportation problem. Moreover, as to many of the major film distributors on feature films, there is no agreement by the theater owner to exhibit any film until after that film has reached Utah, been processed, and a trade screening has occurred at which the theater owner has a chance to actually see the film. As to these films, the purpose of delay is to offer the commodity for license to the theater owners.

This film handling and delay occurs when the film reaches Utah for the first time. In many instances, after the first showing, the film returns to the exchange for projection and damage inspection, and storage to await execution of further contracts of exhibition and further booking, and may remain in such storage for an appreciable period of time. This case is not only concerned with the initial Utah transport, but with all subsequent movements as well, so long as they are within state boundaries.

This court has consistently held that delay of this type serves the business interests of the shipper and not transportation requirements. Thus, in *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U.S. 257, the Oil Company maintained Florida storage tanks and warehouses for receiving and storing oil products produced and shipped to Florida from other states and countries. From Florida facilities the products were reshipped to local bulk stations in Florida, which, in turn, shipped to consumers in tank wagons. Occasionally service stations were directly supplied from the main storage facilities. About 95% of the fuel oil was sold on contracts executed before the oil had been shipped to the Florida storage tanks, and at the time the shipment was made from point of origin the final destination of any particular cargo could not be

determined. There was no through freight rate, and no joint arrangement of any kind as between transportation to storage and from there to consumers. In holding that the Florida movements were intrastate in nature, and that intrastate freight rates should apply, this court stated, page 269:

> "The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which in intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."
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> • • •

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate."

In *General Oil Co. v. Crain*, 209 U.S. 211, 230; the Oil Company sought an injunction against collection of a tax for inspection of oils in Tennessee, which it had brought into that state and stored in tanks. The tanks were either marked as containing oil already sold in the respective states of Arkansas, Louisiana, and Missippi, as oil to be distributed in Tennessee, or as containing oil to be sold in those same states, but for which there were no orders at the time the shipment from the manufacturing plants had been received This Court held that the tax was not a burden on interstate commerce, and that the oil was stored for the convenience of distribution and reshipping in tank cars and barrels for purposes outside its mere transportation. At page 230:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detnold, Prosecutor v. Engle, supra, but for the business purposes and profit of the company. * * *"

The foregoing decisions contain an underlying concept that when a delay between transportation movements is one which serves the business needs of the shipper and is not a necessary pause for transportation requirements, such pause is not an incident of transportation and usually means that one movement has terminated and the shipment has come to rest. An entirely separate and distinct movement begins when such goods are again trans-

ported to the ultimate consumer. This is precisely what occurred with respect to the film shipments in this case. The mere fact that there exists an intention that such second transportation will occur, does not blend the two movements, and thus convert the second intrastate movement into one in interstate commerce.

Film transportation in this case presents such a situation. The films move into Utah in interstate commerce, and as is the case in a typical warehouse distribution system, they then come to rest at the exchanges to serve the purely business purposes of the distributors. There is no through freight rate, no in-transit privilege, and no joint arrangement of any kind between transportation to Salt Lake City exchanges and subsequent transportation locally to Utah theaters. When the film is transported to the theaters at a later date it is an entirely separate film movement and when that movement is between Utah points, it is in intrastate commerce.

In *Susquehanna Coal Co. v. South Amboy,* 228 U.S. 665, 669, Pennsylvania coal was shipped to a New Jersey tide water port, where if no bottoms were available for further transportation it was transferred into a storage yard, it being intended to keep a certain amount of coal on hand to fill anticipated orders. This court held that the interstate movement ceased when the coal reached such storage yard, and it was, therefore, subject to state taxation. In this case, the coal was intended to be ultimately transported to the consumer, yet such intention did not alter the basic nature of the transportation movements and the termination of shipment at the storage yard.

Again, in *Independent Warehouses, Inc. v. Scheele,* 331 U.S. 70, coal from Pennsylvania mines was shipped to a New Jersey yard which was to be later shipped out

to various destinations. The coal was held in the yard under transit privileges which contemplate that coal could be shipped from the mine to the yard, there stored, and later shipped to destination on a through tariff rate. In holding that the interstate shipment ceased when the coal reached the storage yard, thus permitting imposition of a local license tax, the court stated, page 83:

> "The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. 'The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied.' Minnesota v. Blasius, 290 U.S. at 10, 78 L. Ed. 136, 54 S.Ct. 34."

In *B. & O. S.W.R.R. Co. v. Settle,* 260 U.S. 166, Mr. Justice Brandeis emphasized, page 173:

> "The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. Shipments to and from distributing points often present this situation, if the applicable tariffs do not confer reconsignment or transit privileges."

See also:

American Steel & Wire Co. v. Speed, 192 U.S. 500; *Southern Pacific Co. v. Arizona*, 249 U.S. 472; *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465; *Arkadelphia Milling Co. v. St. Louis, S.W.R.R. Co.*, 249 U.S. 134; *Bacon v. Illinois*, 227 U.S. 504; *Chicago M. & St. P. R. Co. v. Iowa*, 233 U.S. 334; *Brown v. Houston*, 114 U.S. 622; *Pittsburg Southern Coal Co. v. Bates*, 156 U.S. 577.

In addition to the manner in which film is processed and handled at the Salt Lake City exchanges before it is transported for exhibition at Utah theatres, there is another factor which unquestionably indicates the intrastate nature of the transportation in Utah. The film is transported to Utah under contracts of shipment between the distribution companies and the carrier. It seems clear that this transportation has nothing whatsoever to do with the Utah theater exhibitors. When the time comes for Utah shipment, however, the contracts or arrangements for this transportation are made by the theater owner, who is free to select not only the type of carrier as between rail, truck, or parcel post, but the particular carrier itself. It is true that the exhibitor retains the broad right of approval, which is essentially based upon selection of a carrier by the theater owner which has proper operating authority and insurance, but this does not alter the fact that it is the theater exhibitor who contracts with the carrier, pays the costs of transportation, and to whom the bill of lading is issued. There are two entirely distinct contracts of transportation, involving entirely different parties and independent rates and payment. While it is undoubtedly true that the manner of billing will not alone determine the nature of commerce, it is likewise true that it is a factor to be considered in determining the nature

of the transportation. When these facts are coupled with the complete break in transportation which occurs at the exchanges, it becomes even more apparent that we are here concerned with two separate movements, one into Utah and the other within Utah.

Respondent has attempted to present a theory of a continuining flow of transportation movement from the out-of-state film laboratories into the Utah exchanges, and ultimately back to the laboratories. In support of such contention it is urged that title to the films remains in the distributing companies and that they merely license exhibition, and that when the exhibition has been finally accomplished the old film is returned to out-of-state laboratories for junking. The actual ownership of the film has no relation to any question of transportation involved in this case. The theater exhibitor acquires the right to use this film for showing in his theater for a period of time, and pursuant to such right the film is delivered to his possession. As a necessary incident to such use and possession he transports or causes to be transported such film. The fact of legal title has no relation whatsoever to the nature of the shipping movement under such facts, nor can commerce be alternately classified as inter or intrastate merely because the title may rest in one person or another. Mere formalities do not control, and the question is one of substance.

So far as the film junking is concerned, this occurs after the film has been in use at the exchange for a considerable period of time extending into months and even years. During this period much of the film may lie dormant awaiting contracts for exhibition and booking. Whatever the reason for its Utah storage, the fact remains that this period of delay has nothing whatsoever to do with

transportation or shipping requirements. The ultimate movement from Utah back to the film laboratories, with the film stripped from the reels and placed in metal barrels, is distinct from shipment while the film is in active use and exhibition, and unlike the Utah transportation is arranged and paid for by the film distributor rather than the theater exhibitor.

There is a considerable variance in time lapse in film shipment, between Utah arrival and Utah shipment. In some instances, the second shipment may occur in relatively short time involving a matter of days, or it may in other instances be much longer. That such time lapse is of no consequence in determining the nature of the commerce has been pointed out by this court, *B. & O. v. Settle*, 260 U.S. 166, 173.

It must be clear then that the Circuit Court of Appeals has not only misinterpreted, but misapplied as well, important decisions of this Court and of the courts of other Circuits. If allowed to stand, the decision herein will drastically alter presently accepted concepts of interstate and intrastate commerce in relation to transportation, upon a nationwide scale, not to mention the confusion which will result therefrom. It will also unsettle commonly accepted distribution-transportation practices and principles established and followed for many years by both the transportation and shipping industries. It will without doubt make worthless the intrastate operating rights and certificates of hundreds of local intrastate carriers, as well as divest them of a major portion of their present traffic. It is difficult to conceive of a single industry upon a national scale that does not intend that the commodities handled and shipped by it to various state distributors shall eventually be transported to dealers, exhibitors or

businesses at final destination throughout each state, which traffic is now being transported by hundreds of local intrastate carriers holding intrastate certificates from the various state commissions.

The Petitioners herein earnestly feel they are not only representing their own interests in urging that the Judgment of the Circuit Court of Appeals be reversed, but that they are also representing important principles effecting the businesses and fortunes of many hundreds of firms and peoples.

III

A single district judge had jurisdiction to hear and determine this case between a private corporation plaintiff and the Public Service Commission of Utah, an administrative agency of the State of Utah, defendant, so far as Section 2281 of Title 28 of the United State Code is concerned. The district judge, however, should have dismissed the case in view of the availability in state court of judicial review of orders of the Public Service Commission of Utah, adequately preserving any federal question arising under commission order.

The order allowing Certiorari requested counsel to discuss on briefs and oral argument the question whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code. For the convenience of the court we repeat at this point that section:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an adminis-

trative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

In connection with an analysis of this question pertinent provisions of the pleadings are relevant. Paragraphs 6, 7, and 8, and the prayer of the complaint (R. 23) read as follows:

"(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the plaintiff and imposing an undue burden upon interstate commerce.

"(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreels in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer *irrepairable* injury unless defendants are enjoined from their threatened action.

"(8) That this case arises under the Constitution and laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate

commerce and the exclusive authority to regulate the same.

Wherefore, plaintiff demands judgment against the defendants, and each and all of them, as follows:

(1) That the Court make and enter a declaratory judgment adjudicating that the transportation of motion picture film and newsreels is interstate commerce.

(2) That the defendants, and each and all of them, be forever enjoined and restrained from interfering with the transportation of motion picture film and newsreels in Utah by plaintiff over the routes as authorized by the Interstate Commerce Commission under docket No. MC89684 and all subs and amendments thereto."

The answer of the Public Service Commission of Utah, directed to these paragraphs, reads as follows (R. 4):

"Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8), except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied."

The pleadings themselves do not contain any direct reference to the constitutionality of any law, either state or federal, nor has the case been tried or at any time

argued on any such premise. The only reference in the pleadings to any specific statute as such is the allegation of paragraph 8 that the Congress has delegated to the Interstate Commerce Commission power to regulate interstate commerce. It would seem implicit in the pleadings that the authority and existence of the Public Service Commission is unchallenged, within its appropriate sphere of action.

In essence the controversy centers on whether or not the particular transportation of films between Utah points is a movement in interstate commerce and subject to the sole regulation of the interstate commerce commission, or in intrastate commerce and subject to the exclusive regulation of the Public Service Commission. The Utah commission in effect asserts that since the transportation is in intrastate commerce it will prevent the respondent from conducting the same unless and until he is authorized to do so by appropriate administrative order of the Commission. The prevention itself will presumably occur also by proper commission order.

The problem is one of jurisdiction, and must involve a substantial claim as to the invalidity of the statute. *Stratton v. St. Louis Southwestern R. Co.*, 282 U.S. 10, 16.

Mr. Justice Frankfurter summarized the purposes and history of legislation providing for the three judge district court in cases where an injunction is sought for the enforcement of an order made by an administrative board or commission acting under State statutes in *Phillips v. United States*, 312 U.S. 246, 248. In that case, the Governor of Oklahoma was attempting to press claims against the Grand River Dam Authority, a federal project, for flooding of roads within the dam area. He declared martial law, and secured an ex parte order in a state court re-

straining further work on the dam. In holding that the controversy did not require a district court of three judges, the opinion stated, page 248:

> "By § 266, which is set forth in the margin, Congress provided an exceptional procedure for a well-understood type of controversy. The legislation was designed to secure the public interest in "a limited class of cases of special importance." Ex parte Collins, 277 U.S. 565, 567, 72 L. ed. 990, 991, 48 S.Ct. 585. It is a matter of history that this procedural device was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity. While Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket. Moore v. Fidelity & D. Co., 272 U.S. 317, 321, 71 L. ed. 273, 278, 47 S. Ct. 105. The history of § 266 (See Pogue, State Determination of State Law, 41 Harvard L. Rev. 623, and Hutcheson, A Case for Three Judges, 47 Harvard L. Rev. 795), the narrowness of its original scope,

the piecemeal explicit amendments which were made to it (see Act of March 4, 1913, 37 Stat. at L. 1013, chap. 160, and Act of February 13, 1925, 43 Stat. at L. 936, chap. 229, 28 U.S.C.A. § 345, amending § 238 of the Judicial Code), the close construction given the section in obedience to congressional policy (see, for instance, Moore v. Fidelity & D. Co., supra; Smith v. Wilson, 273 U.S. 388, 71 L. ed. 699, 47 S. Ct. 385; Ex parte Collins, 277 U.S. 565, 72 L. ed. 990, 48 S. Ct. 585, supra; Oklahoma Gas & E. Co. v. Oklahoma Packing Co., 292 U.S. 386, 78 L. ed. 1318, 54 S. Ct. 732; Ex parte Williams, 277 U.S. 267, 72 L. ed. 877, 48 S. Ct. 523; Ex parte Public Nat. Bank, 278 U.S. 101, 73 L. ed. 202, 49 S. Ct. 43; Rorick v. Everglades Drainage Dist., 307 U.S. 208, 83 L. ed. 1242, 59 S. Ct. 808; Ex parte Bransford, 310 U.S. 354, 84 L. ed. 1249, 60 S. Ct. 947), combine to reveal § 266 not as a measure of broad social policy to be constructed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."

The opinion also states, page 252:

"The claim proves too much. Probably most of the actions of governors trace back to the common provision charging them with taking care that the laws be faithfully executed. Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of § 266."

Again, in E. Parte Bransford, 310 U.S. 354, involving

a petition by the Valley National Bank of Arizona in a Federal District Court for an injunction restraining collection of Arizona state taxes by a county, the court held the suit had been properly presented to a single district judge. The opinion states, page 358:

> "The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and Rev. Stat. sec. 5219 depend upon no constitutional provision within the meaning of Judicial Code, sec. 266. If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act.
>
> "The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to sec. 266 in Ex parte Buder, and before that a similar result had been reached in Lemke v. Farmers Grain Co. in regard to a provision of the Judicial Code granting direct appeal to this Court in cases where the sole issue was the unconstitutionality of a state statute."

Also, at page 361:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked

as unconstitutional. The latter petition does not require a three judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction."

* * *

"Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute. There is no indication that Congress sought by § 266 to have every attack on the constitutionality of a state statute determined by a three-judge court. It sought such a bench only to avoid precipitate determinations on constitutionality on motions for interlocutory injunctions."

While the facts of *Ex parte Bransford and Phillips v. United States,* supra, may be distinguished from those of the instant case, particularly since the interstate commerce clause is not there involved, the reasoning and logic of these cases is persuasive that this case was properly presented to a single District Judge, without convening the three-judge court. There would seem to be no problem incident to the constitutionality of any of the state statutes relative to the creation and powers of the Public Service Commission of Utah. The concern is with an administrative order which it is claimed erroneously views film transportation as intrastate in character. There is nothing to suggest that upon a judicial determination that such commerce is in reality in interstate commerce, the Public Service Commission would persist in its efforts

to prevent such transportation. The facts would seem to place this case within the meaning of the opinion in *Ex parte Bransford,* supra, as a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by administrative action based upon a statute which is not itself attacked.

It is felt that these relatively recent cases are controlling on this aspect of the question and particularly applicable to this case. We are, however, aware that there are other decisions bearing on the question which, it could be argued, are at variance in some respects with this conclusion. *Ex parte Northern P. R. Co.,* 280 U.S. 142, involving a railroad petition to prevent enforcement of a rate order of the Montana board of railroad commissioners; *Query v. United States,* 316 U. S. 486, wherein the United States sought to enjoin imposition by the South Carolina Tax Commission of a license tax on a United States Army Post Exchange; *May v. Lakeland Highlands Can. Co.,* 309 U. S. 310, wherein citrus fruit dealers sought an injunction against the Florida Commissioner of Agriculture to prevent cancellation of their licenses as such dealers and the enforcement of regulations under state statute providing for establishment of minimum prices to be paid producers.

The foregoing cases are based upon sec. 266 of the Judicial Code, 28 U. S. C., 1940 ed. sec. 380. The only change of concern in sec. 2281, June 25, 1948, is to require a three-judge court in cases where an interlocutory injunction is not sought.

Phillips v. United States, 321 U. S. 246, indicated the view of this court that the legislation relative to the three-judge court, supra, should be construed as a technical enactment in the strict sense of the term. The opinion further pointed out the desire of Congress to protect state legis-

lation in the field of economic enterprise and at the same time properly protect the administrative requirements of the modern federal judicial system. There can be no doubt that the three-judge courts impose a marked strain upon the federal judiciary from the standpoint of judicial administration. Inasmuch as this Court in the order allowing certiorari has directed a consideration of jurisdiction, we feel compelled to note an ancillary, though not strictly jurisdictional, holding in the recent case of *Alabama Pub. Ser. Com. v. Southern R. Co.*, 341 U. S. 341. This case was decided on May 21, 1951, subsequent to the decision of the District court herein on March 7, 1951 (R. 21). The facts are analagous. In this case, the Southern Railway Company brought an action in the Federal District Court to enjoin members of the Alabama Public Service Commission and the Attorney General of Alabama from enforcing Alabama laws prohibiting discontinuance of certain train passenger service. The railroad had applied to the Commission for permission to discontinue certain trains, and after hearing, the Commission denied the application, Notwithstanding the right of the railroad to pursue its right of appeal to the state courts, it filed complaint for injunctive relief in the United States District Court. A three-judge court held the Commission order void, and permanently enjoined the Commission from enforcing either the Commission order or penalty provisions of the Alabama Code. The court held that there was no showing that the Alabama Procedure for review of Commission orders was inadequate to preserve federal questions for ultimate review in the Supreme Court, and that intervention of the federal court was not necessary for the protection of federal rights. The District Court judgment was reversed.

The opinion states, pages 347, 348:

"We take note, however of the fact that a fed-

eral court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operations of trains Nos. 7 and 8 with the public need * * * for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and other Alabama communities directly affected.

"Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, tit. 48 § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, 'supervisory in characted.'"

Also at page 349, 350:

"Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders.

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of federal court is not necessary for the protection of federal rights.

Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.'' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.''

At page 351:

"As this Court held in Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 297, 298, 87 L. ed. 1407, 1410, 1411, 63 S. Ct. 1070 (1943):

'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . . On the contrary, it is but a recognition . . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer . . . .

'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

See also *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496.

The Utah statutes, relative to the Public Service Commission are similar to those of Alabama. Section 76-6-15, Utah Code Annotated 1943, provides for a rehearing before the Commission of its orders, and requires the petition to state the grounds on which applicant considers any order or decision unlawful. Section 76-6-16, Utah Code Annotated 1943, provides for review of the commission decision before the Supreme Court of Utah as a matter of right in any case after the petition for rehearing has been decided, and particularly provides that the review by the Supreme Court of Utah shall include "a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of Utah." These statutes are set forth in full in the appendix of this brief. The Utah Supreme Court has held that the review is concerned with a determination of whether the Commission acted within the scope of its authority, whether the order has any substantial foundation in the evidence, and whether any substantial right has been infringed by such order. *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P. 2d 298, 299.

It is apparent that the respondent had more than adequate procedures available in the Utah Courts to secure a determination of the question involved, on the merits, in this appeal. This litigation arose from a dispute between respondent and the Public Service Commission of Utah. The respondent had been transporting film intrastate within Utah for several years under certificates of authority granted by the Utah Commission. When the Commission refused authority for additional routes, after hearings, the respondent appealed this order to the Supreme Court of Utah which held that public convenience and necessity did not require the issuance of such certificates of authority.

Wycoff v. Public Service Commission, 227 P. 2d 323 (1951). Respondent then took the position that Utah film transportation was in interstate commerce, and therefore not subject to the jurisdiction of the commission. It commenced operations between points wholly within Utah despite the refusal of the Utah Commission to grant authority to do so. Thereupon, the Utah Commission brought an injunction action in the State Court to enjoin respondent's operations. Immediately thereafter, respondent instituted the present action for injunctive relief in the United States District Court.

Under the reasoning of *Alabama Pub. Ser. Com. v. Southern R. Co.*, supra, the federal courts should refuse to take jurisdiction of this case. Such refusal would adequately protect all rights of the respondent who would have available the Utah courts wherein any federal question would be preserved. It is clear that the intervention of the federal court is not necessary in this case to protect federal rights, and the evidence does not show any irreparable injury to respondent, which has an adequate legal remedy, as detailed above. There is no necessity of an injunction by a federal court in this case, and to leave this litigation in Utah courts would not only avoid untimely and unnecessary interference with the State of Utah in the administration of its laws, but will serve the best interests of the federal judicial system.

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

C. W. Ferguson,
314 State Capitol
Salt Lake City, Utah
Attorney for Petitioner,
Public Service Commission
of Utah

Wood R. Worsley,
Walker Bank Building
Salt Lake City, Utah
Attorney for Petitioner,
Joseph J. Milne Truck Line, Inc.

Rex J. Hanson,
Continental Bank Building
Salt Lake City, Utah
Attorney for Petitioner,
Seamons Truck Line

D. A. Skeen,
Walker Bank Building
Salt Lake City, Utah
Attorney for all Petitioners.

Appendix

SECTION 76-6-15 UTAH CODE ANNOTATED 1943

REHEARINGS — NECESSARY BEFORE RECOURSE TO COURTS — STAY.

"After any order or decision has been made by the commission any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding specified in the application for rehearing, and the commission may grant and hold such rehearing on such matters, if in its judgment sufficient reason therefor is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made application to the commission for a rehearing before the effective date of such order or decision, or, if such order or decision becomes effective prior to twenty days after its date, before twenty days after the order or decision. Such application shall set forth specifically the grounds on which the applicant considers such decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days

before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If any application for a rehearing is granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all dispatch and shall determine the same within twenty days after final submission, and, if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision or with any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except as herein otherwise provided, and except in such cases and upon such terms as the commission may by order direct. If, after rehearing and consideration of all the facts including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust and unwarranted or should be changed, the commission may abrogate, change or modify the same. Such order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtues of the original order or decision unless so ordered by the commission.

SECTION 76-6-16 UTAH CODE ANNOTATED 1943

CERTIORARI — FINDINGS CONCLUSIVE — EXCLUSIVE JURISDICTION OF SUPREME COURT.

"Within thirty days after the application for a rehearing is denied, or if the application is granted, within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved by such order or decision rendered upon rehearing may apply to the supreme court for a writ of certiorari for the purpose of having the lawfulness of the original order or decision, or the order or decision on rehearing, inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. Immediately after the service of the writ the commission shall cause notice of the pendency of the writ to be served upon each party to the action or proceeding in which the order or decision was rendered in the manner provided by section 76-6-9. On the return day the cause shall be heard by the supreme court, unless for good reason shown the same is continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of Utah. The findings and conclusions of the commission on questions of fact shall

be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the code of civil procedure relating to writs of review shall so far as applicable and not in conflict with the provisions of this chapter apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

Service of the within and receipt of a copy thereof is here-

by admitted this ..... day of September, A.D., 1952.

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BRIEF ON MERITS.

No. 741. 44

IN THE

Supreme Court of the United States

October Term, 1952.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENETT, STEWART M. HANSON, and W. R. McENTIRE, *Petitioners,*

and

MELVA SEAMONS and ROY HILL, d.b.a. SEAMONS TRUCK LINES, and JOSEPH J. MILNE TRUCK LINES, INC., a Corporation, *Petitioners,*

v.

WYCOFF INCORPORATED, a Corporation, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

WAYNE C. DURHAM,
HAROLD S. SHERTZ,
Attorneys for Respondent.

Of Counsel:
KING, ANDERSON & DURHAM,
SHERTZ, BARNES & SHERTZ.

International, 236 Chestnut St., Phila. 6, Pa.

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Petitioners,

and

MELVA SEAMONS AND ROY HILL, D.B.A. SEAMONS TRUCK LINES, AND JOSEPH J. MILNE TRUCK LINE, INC., A CORPORATION,

Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. When distributors of motion pictures ship prints thereof from California and New York via their branch exchange offices in Utah for showing by exhibitors of motion pictures in the area of several states served by such branch exchanges, under contracts between such distributors and exhibitors providing for exhibition under limited copyright,

is the transportation between such exchanges in Utah and exhibitors in Utah in interstate commerce?

2. Whether a single district court judge had jurisdiction to determine whether the transportation between points in the State of Utah of motion picture film, under the facts of record, was in interstate commerce and could lawfully be transported under the authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission, without interference by the Public Service Commission of Utah, in view of Section 2281 of Title 28 of the United States Code.

COUNTER STATEMENT.

To correct certain inaccuracies and omissions in the "Statement" of the petition's brief, pages 3-8, it is deemed necessary to make a "Counter Statement."

Respondent, Wycoff Company, Inc., a corporation, is engaged in the transportation of motion picture film including newsreels between motion picture exchanges at Salt Lake City, Utah, and exhibitors of motion pictures at various points in Utah, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. This certificate authorizes such transportation between the Salt Lake City exchanges and points not only in Utah but as well in the States of Idaho and Montana (R. 1). Petitioner, Public Service Commission of Utah, issued respondent an "Interstate License" to transport under the authority of the certificate issued by the Interstate Commerce Commission, within the State of Utah (R. 2).

The Commission petitioner, in answer to these facts averred in the complaint, in the District Court, below, admitted that the transportation of newsreels between points in Utah is in interstate commerce (R. 3). The answer takes exception to these facts only to the extent that they infer that the transportation of motion picture film, other than

newsreels, within the State of Utah, is interstate in character, or that the "Interstate License" issued by it, declared that the transportation of motion picture film within the State of Utah is in interstate commerce or interstate in character (R. 3-4).

The Interstate Commerce Commission could have issued such certificate to respondent, authorizing transportation between points in the State of Utah, under the limitation of the Interstate Commerce Act, 49 Stat. L. 551, 49, USCA 307, only upon a finding that the service authorized thereby:

> "is or will be required by the present or future public convenience and necessity".

Further facts admitted by petitioners in their request for admission of facts, District Court, below (R. 4-7), and reply of respondent (R. 7-8), are as follows:

The transportation of newsreels has been designated as interstate in character by the Interstate Commerce Commission (R. 7-8). Newsreels are customarily produced, processed, manufactured and packaged outside of the State of Utah, and are shipped from out-state points into the State of Utah for the purpose of being exhibited in theatres in Utah and the surrounding states. These newsreels are customarily booked under an agreement whereby the theatres in Utah and the other states contract in advance to receive and exhibit the newsreels prior to actual delivery in the State of Utah. It is customary for exhibiting theatres to show not only a newsreel, but also other films designated as a feature, comedy and also short subjects, all of which are distributed by different national film companies having branch offices in Salt Lake City, Utah. The distributors have principal offices in New York and California, and maintain branch offices in Salt Lake City from which they distribute the various types of motion pictures throughout Utah and the surrounding states (R. 4-5).

In addition to the newsreels, the other motion picture films are likewise processed, manufactured and packaged outside the State of Utah for shipment to the State of Utah. These film distributors do not sell newsreels, features nor comedy films, but only license the right to exhibit them, and the ownership remains in the film distributors. The local distributing office in Utah is merely a branch office of the non-resident film company (R. 7-8). The branch offices so maintained by some twelve national distributors distribute the film not only in the State of Utah, but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada (R. 6-7).

With the above facts admitted by agreement, the factual issue is narrowed to the following:

Is the other motion picture film (features, comedies and short subjects) interstate in character in the same manner as admitted for newsreels?

To determine the answer to this question, it is necessary to review the entire transaction in order to determine the essential nature of the commerce.

Witnesses from five national distributors testified and showed the practice to be as follows:

Salesmen from the branch exchange offices of the distributors in Salt Lake City solicit applications from exhibitors, in the territory of the states served by these exchanges, to be licensed to exhibit the motion picture described therein. These applications which are in the form of a standard contract, are then sent by the exchange to the main office of the distributor, generally in New York, for approval or rejection. The contract for such licensed showing by the exhibitor does not become effective until approved and accepted by the home office (R. 28, 52, 59, 63-65, 70, and Exhibits of agreements, R. 82A, 82C).

These agreements designate the theatre and its location and describe the pictures licensed to be there shown, the conditions and limitations under which the distributor permits the exhibitor to have them for showing, the time the exhibitor may retain them for showing, provide the

means by which the exhibitor may obtain the prints from the distributor and return them to the distributor. (See contracts (R. 82A, 82C).)

Exhibit No. 1 (R. 82A) is a standard form of Republic Pictures (R. 63). The first paragraph of this agreement specifically provides:

> "LICENSE—FIRST: The *Distributor grants the Exhibitor*, and the Exhibitor accepts, *a limited license under the respective copyrights* of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, *to exhibit* publicly *said motion pictures* and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm. film, *at the said theatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates therein provided for only, and for no other use or purpose;* provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theatres unless otherwise in the Schedule specifically provided. (Emphasis supplied.)
>
> "TERM AND WARRANTY—SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be

excluded, as provided in Clauses FOURTEENTH AND FIFTEENTH hereunder."

The fourth paragraph of the agreement requires that the exhibitor shall pay the distributor for any part of the print lost, stolen, destroyed or injured, while in the hands of the exhibitor, and with the distinct condition that, "Such payment, however, shall not transfer title to or in any such positive print to the exhibitor."

Clearly the obligation of the distributor, therefore, is to service the exhibitor with a print to permit the showing under the limited license under copyright of the picture specified by the agreement. The prints are not sold but remain at all times the property and under control of distributor.

The print, during the period it is in the exchange area, remains the property of the distributor and under its full control. The agreement provides for return by exhibitor to distributor when it has served its "limited license under copyright." Full discretion as to maintenance of the prints remains in distributor, which can require the print to be returned for inspection or "circuited" to another exhibitor in the same or another state (R. 36-37) or to another exchange area (R. 31, 32, 61).

The absolute control which distributor maintains, at all times, over the film, is made clear by the testimony of witness Elliott S. Windward of RKO Pictures, Inc., referred to in the supplemental opinion of the Court of Appeals (R. 129), which is as follows:

"Q. Can you state whether or not your office exerts any control over what shipper (carrier) will be employed? Must certain requirements be met by carriers for you to release films to it?

"A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.

"Q. The home office requires approval?
"A. Yes." (R. 53-54). See also Republic (R. 66).

* * *

"A. And his plan of operation enters into it considerably." (R. 57) See also Republic (R. 20).

The exhibitor determines the play date as specified by the contract (R. 54, 77). All bookings are transmitted to the New York Office (R. 27). In some instances the exact date of showing is provided in the contract (R. 54).

"Newsreels"—Agreements for the licensing of newsreels are for an issue covering showing on 52 or 104 specified days (R. 28-29). The contracts are made for a full period of a year (R. 28-29), sometimes for 2, 3, 4 or 5 years (R. 71). Necessarily, these contracts are concluded "before the event (news) has happened," and before the prints are produced (R. 29, 71). Newsreels are subscribed for the same as newspapers (R. 50). Same service in exchange as with shorts and feature pictures—inspection, received in cartons, placed on reels and heads and tails added (R. 27, 41).

"Short Subjects"—Agreements for licensing of short subjects are also written in series for showing on specified days of each week, such as 13 episodes for 13 consecutive Fridays and Saturdays. They are contracted for before produced or they reach the exchange in Utah (R. 61, 52, 28).

"Features"—Feature pictures are received and handled at the exchanges in the same manner as newsreels and short subjects (R. 27, 41). Applications for licensed showing are made by exhibitors to the branch exchange. This application becomes effective as a contract only when approved by the main office of the distributor in New York City (R. 52, 54, 63-65, 70. See also exhibits of contracts, R. 82A, 82C). Some features are sold, like newsreels and short subjects, on a release schedule during 12 months of the release year, on a yearly contract (R. 60. See contract R. 82A, which describes the pictures licenced thereunder).

These prints are not produced when sold (R. 60). Generally the contracts are made before the picture reaches the exchange. Petitioners seek to give the impression that the applications for showing are not received until after a "screening" or showing of the pictures at the exchange. This practice is followed by two of the distributors. The witness from R. K. O. testified that they invite exhibitors to come in to see practically every picture. But the number who go to the screening is nil—only about 6 people attend (R. 55). The other is Twentieth Century-Fox, which does not sell pictures before a trade showing (R. 71). It was not developed how many attend such showings. But it cannot be a controlling factor. It is no more than selling by sample.

The pertinent and controlling fact is that the prints are shipped from the laboratories of the distributors in New York, New Jersey and California, to their branches, the exchanges, in Salt Lake City, Utah, solely for the purpose of carrying out the agreement to permit the licensed showing of the prints so shipped. The only intention with which the prints are shipped into Utah is to permit exhibition of the prints by the exhibitor and at the theatre location named and specified in the contract.

SUMMARY OF ARGUMENT.

Respondent is in accord with petitioners that the determination of whether the considered transportation is in interstate or foreign commerce is essentially one of fact.

All of the decisions are determined on the basis of facts as found in each case, just as the Court of Appeals, below, did in the instant case, in conformity with the finding of Justice McReynolds, in the cited case of *Public Utilities Commission v. Landon*, 249 U. S. 236 (1819) at 245:

> *"Interstate Commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."* (Emphasis supplied.)

The facts are those of the commercial methods developed by the moving picture industry in the distribution of motion picture film.

These facts are very definitely distinguished from the facts in the cases relied upon by petitioners.

The original and only intention of shipping the motion picture prints from the laboratories of distributors in New York, New Jersey and California to the branch exchanges in Utah is to provide for the licensed exhibition of the prints by the exhibitors in Utah, at the destination named in the contracts for such showing between these exhibitors and distributors. That intention was persisted in and carried out. Hence, the essential nature of the movement was interstate.

This is the doctrine of *B. & O. v. Settle*, 260 U. S. 166, which gives support to the opinion of the Court of Appeals, below, in the statement pages 170-171:

> "And whether the interstate or the intrastate tariff is applicable depends upon the *essential character of the movement*. That the contract between shipper and carrier does not necessarily determine the char-

acter was settled by a series of cases in which the subject received much consideration."

* * *

"Under these circumstances, *the intention as it was carried out determined,* as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the *intention* with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been *intended,* these incidents are without legal significance as bearing on the character of the traffic."

The Court of Appeals, below, has properly, under the facts and the law, found the transportation to be interstate.

Actually, the only question presented to the District Court, below, was whether respondent could transport the film, between points in Utah, under the authority given it by the Interstate Commerce Commission, and if so whether the petitioner, Public Service Commission of Utah, could interfere therewith.

Since no question of the constitutionality of the law creating such commission was raised the single judge of the District Court, below, had jurisdiction.

ARGUMENT.

I.

Under the Facts of Record the Transportation Here Involved Is Interstate.

The only question for determination is whether respondent may legally transport motion picture film between points in the State of Utah under the certificate of public convenience and necessity issued to it by the Interstate Commerce Commission.

The determination of whether or not the Court of Appeals, below, erred, depends upon whether the facts were properly construed and applied to the law.

This statement coincides substantially with the statement made by petitioners at page 9 of their brief:

> "a determination of whether the film transportation in this case wholly between Utah points, is in inter- or intrastate commerce is essentially a factual consideration."

This case is controlled by, and limited in its effect, to the facts peculiar to the distribution of motion picture prints by the major distributors thereof from laboratories in New York, New Jersey and California, under agreements, made in New York, and obligating the delivery of such prints to motion picture exhibitors in Utah, for showing such prints under limited license.

This method of distribution has been developed by the motion picture industry uniformly throughout the United States. The distribution is effected through some thirty-two centers at which the distributors have branches, known as exchanges.

The present case involves the distribution center at Salt Lake City, Utah. Similar facts involving the distribution of motion picture film through other distribution centers have been considered by your Court and other Federal Courts.

In *Binderup v. Pathe Exchange*, 263 U. S. 291 (1923) there were like facts relating to distribution of motion picture prints through the Omaha, Nebraska, Center. While that case related to the Anti-Trust Act, and it is admitted that the general conclusions as to jurisdiction under that Act would not be decisive in the present case, yet it made certain findings with respect to the facts which are pertinent to the present proceeding.

Mr. Justice Sutherland construed the facts of that case, at page 309, as follows:

> "The film contracts were between residents of different States and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessee, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. *The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.'* Illinois

Central R. R. Co. v. Louisiana R. R. Comm., 236 U. S. 157, 163. And see, Western Union Tel. Co. v. Foster, 247 U. S. 105, 113; Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349." (Emphasis supplied.)

This construction is remarkably similar to the construction of the facts of the instant case by the Court of Appeals below.

Kappler v. Republic Pictures Corporation, 59 F. Supp. 12 (1945), affirmed 151 F. (2d) 543 (1945), affirmed *per curiam*, 327 U. S. 757 (1945), and on which rehearing was denied, 327 U. S. 817 (1945), considered the distribution of motion picture film through the Des Moines, Iowa, distribution center. This case reviewed the application of the Fair Labor Standards Act of 1938, which required an analysis of the transportation involved in the distribution of motion picture film as appears by the findings, based upon the facts as follows;

The District Court, said;

"The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in the state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

"The defendant overlooks, however, the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third party.
* * *

"Under this situation, the goods did not come to rest in Iowa, but *the interstate character of the transportation continued until the goods were in the hands of exhibitors, and even then they only stopped temporarily as the goods were licensed and not sold, and the transportation continued until after all the exhibitors*

had used them when they were returned to Des Moines and probably back to New York City." (Emphasis supplied.)

The Circuit Court of Appeals, at page 545, in affirming the above decision of the District Court, said:

"*Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other points of Iowa and other states.*" (Emphasis supplied.)

* * *

"Plaintiff does not contend that he was engaged in the actual production of goods for commerce. As has been observed, he kept records which were essential to the *movements* of the goods of the employer in commerce." (Emphasis supplied.)

These constructions of the facts relating to the distribution of motion picture film, are in full accord with the general principles repeatedly enunciated in distinguishing between interstate and intrastate traffic.

Illinois Central R. R. C. v. Fuentes et al., Constituting the Railroad Commission of Louisiana, 236 U. S. 157 (1915) related to an order of the Railroad Commission of Louisiana relative to switching of cars between connecting carriers and requiring carriers to conform to rates established by the State Commission. A situation arose where cars from outside the state were consigned to an individual at New Orleans. After arrival, the consignee desired the cars switched to certain locations within the switching limits, to some terminal or industrial track for delivery. The opinion, in finding that a permanent bill of injunction against

the State Commission should have been awarded, found at page 163;

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. McNeill v. Southern Railway, 202 U. S. 543, 559; Southern Pacific Terminal v. Interstate Commerce Commission, 219 U. S. 498, 527; Ohio Railroad Commission v. Worthington, 225 U. S. 101, 110; Texas & New Orleans Railroad v. Sabine Tram Co., 227 U. S. 111, 126; Louisiana Railroad Commission v. Tex. & Pac. Ry., 229 U. S. 336, 341."

Western Oil Refg. Co. v. Lipscomb, 244 U. S. 346 (1917) laid down the general rule, at page 349:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Louisiana Railroad Commission v. Texas & Pacific Ry. Co., 229 U. S. 336, Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 343;

South Covington & Cincinnati Street Ry. Co. v. Covington, 235 U. S. 537, 545."

Western Union Telegraph Co. et al. v. Foster et al., 247 U. S. 105 (1918) commenting upon *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 126; said,

"Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, * * *"

Under the facts of record, the distribution of motion picture prints falls clearly within the above findings and established principles of law. The lease agreement obligates the distributors to ship prints from their laboratories outside of Utah, to exhibitors in the State of Utah, and other states within the distribution area of the branch exchanges of the distributors at Salt Lake City. Otherwise these exhibitors could not show or exhibit these prints under the license of the lease agreement. Definitely, therefore, the only intent or purpose with which the distributors could so ship the prints was to get them into the hands of the exhibitors who have contracted for their showing. There is, therefore, a continuing transportation until the prints have reached the exhibitors. The transportation into Utah is interstate and so remains, unbrokenly, until the film has reached the intended exhibitors at the destinations specified in the agreement of lease. The essential character of the transportation is, therefore, interstate. As indicated by the *Western Union* case, *supra*, the courts, in construing the facts, consider the actual commercial practices as bearing upon the intent of the parties. In line with these decisions, the Court of Appeals in *Kappler v. Republic Pictures Corp.*, *supra*, found that the distributors were not shipping the film to be stored or for final delivery, but their business depended upon these films being kept in circulation. The District Court in that case was following these principles in finding that even after the film was in the hands of the exhibitors, "they only stopped temporarily as

the goods were licensed and not sold, and the transportation continued after all the exhibitors had used them when they were returned" to the exchanges.

Under the foregoing analysis of facts and the applicable principles of law, the Court of Appeals, below was fully justified in its conclusions and findings, and, therefore, its decision should be sustained.

The facts underlying this distribution are different and definitely distinguished from those in *Atlantic Coast Line R. R. Co. v. Standard Oil Co.*, 275 U. S. 257, and the other cases relied upon by the brief of petitioners as clearly stated in the abstract from that case set forth on page 22 of petitioners' brief, as follows:

> "The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa. Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it."

In *Beggs v. Kroger Co.*, 167 F. 2d 700 (1948), (C. C. A. 8, 1948), Kroger maintained a warehouse in Little Rock, Ark., from which it supplied its retail stores in Arkansas. It distributed its goods from its warehouse in Little Rock to its stores throughout Arkansas by its own trucks. The drivers of these trucks sought relief under the Fair Labor Standards Act for additional compensation. The defense of Kroger was that the transportation was in Interstate Commerce and that, therefore, the activities of the truck

drivers were exempt from the Fair Labor Standards Act. In holding for the defendant, the Court said:

> "Practically all of the goods the defendant transported to its retail stores in Arkansas were processed, manufactured or processed outside the state for the specific purpose of being moved to the retail stores for sale. That part of the goods which went through the warehouse did not 'come to rest' in the warehouse. The warehouse was merely a convenient instrumentality for the division of the shipments coming to it, and the continuation of the movement of each part to the retail stores. The facts in this case distinguish it from cases such as *Atlantic Coast Line Ry. Co. v. Standard Oil of Ky.*, 275 U. S. 257. Here, the defendant knew when the shipments began out state that all of them were destined to the retail stores. The warehouse was not a wholesale establishment, and none of the goods that entered it were resold."

The Interstate Commerce Commission in *Transway, Inc. v. Exhibitors Delivery Service, Inc.*, 51 M.C.C. 263 (1950), had before it a complaint which was filed against a carrier for transporting newsreel between points in Louisiana without authority from that Commission. The factual material in the *Transway* case is essentially similar to the facts involved in this case, except that the complaint was restricted to the transportation of newsreels and did not relate to the transportation of other film. In finding that the transportation of newsreels between points in Louisiana was interstate in character, the Commission said:

> "But it has long been held that such incidents of transportation as through billing, uninterrupted movement; continuous possession by the carrier, or unbroken bulk of the shipment, are not essentials of a through interstate shipment, when the intention with which the shipment is made is not in issue."

The Court of Appeals below, was amply sustained in its findings and conclusions, by the facts and the law.

II.

Petitioners Seek to Avoid the Effect of the Facts of Record and the Applicable Law by Certain Immaterial Contentions.

Petitioners, in their brief, attempt to avoid the controlling effect of the facts and the law, herein previously recited, confirming the findings and conclusions of the Court of Appeals, below. These contentions, which have no material effect, may be summarized as follows.

1. *Certain acts performed by the branch exchange after arrival of the prints in Utah, are advanced as ending the interstate movement of the prints.*

These consist of:

a. The exchange receiving the prints in cartons from which they are removed. This is construed to bring the prints under the break bulk theory.

b. Inspecting the prints, mounting them on reels, and adding "heads and tails."

The bulk is broken by an agent of the distributor, and not for resale. The prints, wound on reels and with "heads and tails" added are still the prints which the distributor shipped from out the state with the intention of fulfilling the agreement to permit their licensed exhibition by the exhibitors, and at the locations specified in the agreements.

If these services were performed at the laboratory, these contentions of the petitioners would be removed. The fact that the distributors had them performed by their branches in Utah could not affect the character of the interstate transportation under the facts here of record, and the applicable law.

These factors did not affect the findings in *Binderup v. Pathe Exchange* and *Kappler v. Republic Pictures Corp., supra.*

These contentions of petitioners are fully considered and answered in *Caldwell v. North Carolina,* 187 U. S. 622, (1903). The City of Greensboro, N. C. passed an ordinance requiring every person engaged in the business of selling or delivering picture frames, pictures or photographs, in the city, to pay a yearly license tax. A portrait company in Chicago, through an agent in Greensboro, made contracts for the sale of pictures in frames. The company shipped the pictures and frames in separate large packages, from Chicago to its agent in Greensboro. He broke the bulk of these packages and placed the pictures in the proper frames and then made delivery to the purchasers in the city. Contentions similar to those here made by petitioners, were ruled upon at page 631, as follows:

> "We are not persuaded by this reasoning. It seems to proceed upon two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro.
>
> "But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed either on the vendor out of the State or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

"But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for *convenience in packing and handling, and 'placing the pictures in their proper places'* (the language of the verdict), meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

"Transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out

of the salutary protection of the interstate commerce clause of the Constitution.

"It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation." (Emphasis supplied.)

2. *Delay of the prints at the branch exchanges, it is contended, terminates the interstate transportation.*

The brief of petitioners does not indicate any evidence of record showing great delay of the prints at the branch exchange. Taking the record as a whole the evidence is that the object of circulating the prints in the distributive area of the exchange center is to permit the showing of the picture and the liquidation of the print as quickly after the release date as possible. In the case of serials, including westerns; short subjects; and newsreels, they are produced for showing on days prescribed by the agreement of each week. The subjects depicted are such as not to permit of long delay in distribution. Newsreels which form part of the program of the motion picture theater are usable only while they are "news"—and how fleeting that is. Feature pictures must be shown as quickly as possible after the release date. The distributor must get them to the exhibitor and the exhibitor must have them for showing as soon as possible to meet the demand of the public created by the release publicity.

As found by the Court of Appeals in *Kappler v. Republic Pictures Corp., supra,* the distributor was not shipping the films to the exchange center to be stored, "but its business depended upon these films being kept in circulation", and that the exchange was an active factor in keeping

the films in such circulation and use. The record in this case is fully in accord with that finding.

It is clear, therefore, that the interstate character of the shipment cannot be affected, under the facts and circumstances of this case, by the length of time that the film is held by the exchange. The exchange holds the film only the time necessary to provide for its circulation.

3. Petitioners seek to give the impression that the motion pictures are not sold until after they reach the Omaha Exchange.

This is contrary to the evidence.

Petitioners admit in their brief, as is shown by the record, that newsreels are sold on a yearly contract for weekly or semi-weekly showings on particular days of the week. Necessarily, and as admitted by the brief, these contracts are made in advance of the time that the subject of news depicted could have arisen, and the picture could have been taken and produced. The record likewise discloses that short subjects and serials including westerns are similarly contracted for over a period of time providing for the delivery to the exhibitor on specified days of the week. These facts establish that the prints could not have been at the Utah Exchange prior to being contracted for.

This leaves then for consideration, only the feature pictures. Certain of these are also sold on yearly contracts. Witnesses appeared on behalf of five major distributors. Their testimony was, and as confirmed by the exhibits, R. 84A and R. 82C, that the exchanges solicited "applications" from exhibitors to be licensed to show certain designated pictures. These applications do not become effective until they are accepted by the main office of the distributor in New York City. Based upon the number of contracts approved for the licensed showing of the picture specified thereby, and the experience of the distributor, the number of prints of the picture to permit licensed showing by ex-

hibitors, in the area of distribution of the exchange are pped from the laboratories to the exchanges.

4. *Petitioners seek to rebut the plain meaning of the testimony, by contending that the pictures are sold only after "screening" at the exchange.* This means only that exhibitors are given an opportunity to view a print of the picture to determine whether they desire to apply for a licensed showing of it. The testimony is that exhibitors are invited to view such screenings but that very few avail themselves of the invitation. It would require only one print for such screening.

It is no more than selling a product by sample.

This was held in *Caldwell v. North Carolina, supra,* not to change the interstate character of the transportation.

5. *Storage of the prints at the exchange.* The branch exchange is the designated agency of the distributor to receive the prints. The testimony is that during the handling by the branch exchange the prints are stored in fireproof vaults. Such precautions cannot change the character of the transportation of the prints.

6. *That the transportation is arranged and paid for by the exhibitor cannot change the character of the commerce under the facts of this case and the applicable law.* The obligation of the distributor is to bring prints into the exchange to carry out the provision of its agreements to license the showing of the subject depicted thereby by the exhibitor. The agreement, paragraph 21 (exhibit 1, R. 82A), provides that distributor shall deliver a print to the exhibitor or his agent or to a common carrier designated by the distributor. This difference in transportation agencies or the question of who arranges for or pays the respective carriers is not controlling in determining the character of the commerce in which each carrier is engaged.

III.

The Effect of Sustaining the Findings and Conclusions of the Court of Appeals, Below, Would Not Extend Beyond Transportation Performed Under the Facts, Here of Record.

Petitioners contend that to allow the decision, herein, to stand, would drastically alter presently accepted concepts of interstate and intrastate commerce in relation to transportation upon a nation-wide scale. Such contention is not sound. It is inconsistent with the statement at page 9, of petitioners' brief, that the determination of whether film transportation in this case, wholly between the Utah points, is in interstate or intrastate commerce is essentially a factual consideration. The law is well settled. The determination as to whether the transportation is interstate or intrastate depends entirely upon the facts and circumstances in each case. The decision of the Court of Appeals, below, is limited solely to the facts and circumstances under which motion picture film is distributed. The decision would not be controlling under facts and circumstances which clearly show that the interstate transportation had ended upon entry into the state such as in *Atlantic Coast Line R. Co. v. Standard Oil Co., supra,* and other cases cited by petitioners.

On the contrary, the reversal of the opinion of the Court of Appeals, below, would create conflicts between federal laws and agencies.

It would prohibit respondent from operating under its certificate issued by the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, *supra,* requiring a finding by that Commission, that the grant of such authority is required by public convenience and necessity.

It would also deny respondent the benefit of the exemption under the Fair Labor Standards Act of 1938 (29 U. S. C. A. § 201 et seq.), extended to the employees of motor carriers under the control of the Interstate Commerce Commission.

In *Kappler v. Republic Pictures Corp., supra,* the Court found that the transportation, as here involved, was in interstate commerce. Your Court affirmed that decision. Also in *Beggs v. Kroeger, supra,* the court found that employees engaged in transportation between points in a state, under circumstances similar to those in the case here for consideration were exempt from the provisions of the Fair Labor Standards Act of 1938, *supra,* because they were under the control of the Interstate Commerce Commission.

Hence under these decisions respondent would be made subject to all of the provisions of the Fair Labor Standards Act of 1938, *supra.* It could enjoy the exemption from maximum hours of service of that Act only if, as found by the Court of Appeals, below, the transportation performed was within the authority of the Interstate Commerce Commission.

IV.

A Three-Judge District Court Was Not Required in This Case Because an Actual Issue of Unconstitutionality of a State Statute or Administrative Order Within the Meaning of Section 2281 of Title 28, United States Code Was Not Pressed Upon the District Court.

This proceeding arises out of a complaint brought by respondent in the U. S. District Court, for the District of Utah, below, for a declaratory judgment:

> "That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations."

The prayer of the complaint requested an injunction against the petitioner, Public Service Commission of Utah, to guard against the possibility that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission, that petitioner had so threatened (R. 2, Par. 6 and R. 4), although

never actually carried out. It is true that a complaint was filed by the Public Service Commission of Utah to enjoin respondent from operating to a few specified points in Utah in the state court, but process was never served upon respondent (R. 64), and the Utah Commission thereafter acquiesced that the federal court was the proper forum to determine what was, or was not, interstate commerce.

As indicated in petitioners' brief, respondent did not challenge the regulatory authority of the Utah Commission acting in its proper sphere (Page 32, petitioners' brief). Respondent challenged only whether the State Commission was acting in its proper sphere, and the State Commission did not suggest that it would resist the judicial determination that respondent's operations in Utah were in interstate commerce (Page 36, petitioners' brief).

Accordingly, the case proceeded to trial, in the District Court, below, upon only the two issues set forth in Judge Ritter's pre-trial order:

> "(1) Whether or not as a matter of fact the carriage involved herein is interstate commerce.
>
> "(2) The issue of law as to whether the character of transportation as determined constitutes interstate commerce."

Injunctive relief, neither temporary, interlocutory nor permanent, has ever been granted or even urged be granted by the court outside of the naked recitation in the prayer of the Complaint. The sole question on appeal to the Court of Appeals for the 10th Circuit was stated by the court to be "whether the intrastate transportations are nonetheless integral parts of interstate transportation" (R. 84).

No useful purpose will be served by repeating and quoting the facts and authorities set forth in petitioners' brief under the first sentence of their Point III in support of the proposition that a three-judge court was not necessary in this case (see petitioners' brief, Pages 29-36), which are essentially agreed to by us. We wish to point out that the reference to the issuance of an *administrative order* by the

State Commission (see Page 36, petitioners' brief) must be speaking only of a *possible future administrative order* because none has ever been issued by that body, nor has any hearing been held by said State Commission to decide whether or not the transportation of motion picture film and newsreels between points in Utah is or is not in intrastate commerce (see also Page 32, petitioners' brief).

The sole question for the district court was to construe the statutory meaning of "interstate commerce" contained in the Federal Motor Carriers Act (49 U. S. C. Sec. 303). Such construction of a federal statute did not involve the unconstitutionality of a Utah statute. There is no order of the State Commission involved in this case. The construction of a federal statute does not involve the unconstitutionality of a state statute under the supremacy clause of the United States Constitution. *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249; *Query v. U. S.*, 316 U. S. 486, 86 L. Ed. 1616; *Ex parte Buder*, 271 U. S. 461, 70 L. Ed. 1036; *Ex parte Hobbs*, 280 U. S. 168, 74 L. Ed. 353; *D. A. Beard Truck Line Co. v. Smith*, 12 Fed. Supp. 964.

Ex parte Buder, supra, involved the question whether the state statute or a federal statute applied, and after considering this question, the court stated, at 271 U. S. —, 70 L. Ed. 1036, 1038, as follows:

> "But in neither of these questions is the constitutionality of the state statutes involved; and a substantial claim of unconstitutionality is necessary for the application of Section 266. See *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 304, 58 L. Ed. 229, 239, 34 Sup. Ct. Rep. 48. The decree is thus not one from which a direct appeal lies to this court."

Ex parte Hobbs, supra, concerned an action to enjoin a rate order of the Kansas Insurance Commission which was alleged to be confiscatory under the 14th Amendment. At 280 U. S. 168, 172, the following appears:

> "He (the district judge) states that it appeared to him that the only question before him was the construc-

tion of the rate-making statute of Kansas, the plaintiff conceding its constitutionality for the purpose of the motion. He construed the act as not warranting a revocation of licenses for violation of the rate order or for anything that the plaintiff appeared to have done, and says that the injunction granted by him was not granted upon the ground of the unconstitutionality of the statute but restrained only something that by his construction the statute did not allow."

Ex parte Bransford held that a three-judge court was not necessary in a case to enjoin an assessment under a state tax statute as violating the United States Constitution and the laws of the United States and Arizona. At Page 358 of 310 U. S., 84 L. Ed. 1249, 1251, the court said:

"Insofar as it is alleged that the assessments are void because unauthorized by the Arizona statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as taxed by the federal Constitution.

"The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and Rev. Stat. Sec. 5219 depend upon no constitutional provision within the meaning of Judicial Code, Sec. 266. If such assessments are invalid, it is because they lavy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act.

"The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to Sec. 266 in *Ex parte Buder*, and before that a similar result had been reached in *Lemke v. Farmer's Grain Co.* in regard to a provision of the

Judicial Code granting direct appeal to this Court in cases where the sole issue was the unconstitutionality of a state statute."

D. A. Beard Truck Line Co. v. Smith, supra, was cited by the court in *Ex parte Bransford* as illustrative of the last proposition cited. That case held that no question of constitutionality was raised requiring the submission of the application to a three-judge court where an interlocutory injunction was sought upon the ground that a state statute, to restrain the enforcement of which the application was made, had been superseded by a federal statute.

Query v. United States, supra, was a case where the actual issue pressed upon the court was that a state statute as applied to the complainants violated the United States Constitution, which required a three-judge court. *Ex parte Northern P. R. Co.,* 280 U. S. 142, 74 L. Ed. 233, and *Mayo v. Lakeland Highlands Can. Co.,* 309 U. S. 310, 84 L. Ed. 774, also cited by petitioners as decisions contrary to the proposition that only a single judge was necessary, are also inapplicable under the present facts. Both cases clearly fall within the statutory provisions requiring a three-judge court because in both cases the complainant actively asserted the unconstitutionality of an administrative order (*Northern Pacific* case) or of a state statute (*Mayo* case).

It has been held that the mere form of words used in the complaint to allege the unconstitutionality of the action of state officers without support in law or fact cannot invoke the jurisdiction of a three-judge court. *Okla. Gas & E. Co. v. Okla. Packing Co.,* 292 U. S. 386, 78 L. Ed. 1318. Also that even though the unconstitutionality of a state statute pursuant to which a challenged order was made was pleaded, a three-judge court was not necessary where the plaintiff indicated that he did not intend to press the claim of unconstitutionality, *Ex parte Hobbs,* 280 U. S. 168, 74 L. Ed. 353.

No temporary restraining order, preliminary injunction, nor permanent injunction has ever been issued by any court in the course of the present litigation, as indicated by petitioners themselves, nor has the issuance of injunctive relief ever been pressed upon the court. This action has been only for declaratory relief. Even if the state of Utah should refuse to recognize the determination of the issues in this case by the Federal Court, which petitioners have specifically indicated is not intended (see Pages 36-37, petitioners' brief), the equity power of a single district court judge would then be sufficient to enter an injunction under the facts of this case.

V.

Defining Interstate Commerce Is a Proper Function of the Federal Courts. It Is Not a Question for State Administrative Determination Subject to State Judicial Review.

The only authorities petitioners rely upon to reverse the Circuit Court of Appeals because of alleged "local" questions are *Alabama Public Service Commission v. Southern R. Co.*, 341 U. S. 341, 95 L. Ed. 1002, and *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 85 L. Ed 971.

Neither of these cases applies here. In *Alabama Public Service Commission v. Southern R. Co.*, there was an administrative order entered by the State Commission pursuant to state statute which ordered the railroad to continue two of its trains which it had applied for permission to discontinue. After a full hearing on the evidence, the State Commission entered an order denying the railroad the requested permission. Without exhausting the state remedy for judicial review in the Alabama courts, the railroad sought to enjoin the order of the State Commission in the Federal District Court before a three-judge court. There is no such administrative order involving respondent which is pending in the courts of Utah, nor is there a "local" question involved.

In *Railroad Commission of Texas v. Pullman Co., supra,* a very controversial local social policy was involved in the order of the Texas Commission which required, in effect, a white pullman conductor where the railroad had theretofore employed only a colored porter to supervise pullman cars in certain sections of Texas. Obviously, no question of this kind is presented in the instant case.

Section 1337 of Title 28, United States Code, hereinafter set forth, was the basis of jurisdiction for the district court below:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

For the foregoing reasons, the Utah statutes providing for judicial review of orders of the Public Service Commission of Utah are not at issue here at all.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

WAYNE C. DURHAM,
Suite 3, Utah Building,
351 South State Street,
Salt Lake City 1, Utah.
HAROLD S. SHERTZ,
226 S. Fifteenth Street,
Philadelphia 2, Penna.,
Attorneys for Respondent.

Of Counsel:
KING, ANDERSON & DURHAM,
and
SHERTZ, BARNES & SHERTZ.

Service of the within and receipt of a copy thereof is hereby admitted this day of November, A. D. 1952.

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_____

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FILED
JUN 5 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1952.

No. 44

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENETT, STEWART M. HANSON, and W. R. McENTIRE, *Petitioners,*

and

MELVA SEAMONS and ROY HILL, d. b. a. SEAMONS TRUCK LINES, and JOSEPH J. MILNE TRUCK LINES, INC., a Corporation, *Petitioners,*

v.

WYCOFF INCORPORATED, a Corporation, *Respondent.*

ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

WAYNE C. DURHAM,
HAROLD S. SHERTZ,
Attorneys for Respondent.

Of Counsel:
KING, ANDERSON & DURHAM,
SHERTZ, BARNES, & SHERTZ.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

October Term, 1952.

No.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON AND W. R. McENTIRE,

Petitioners,

and

MELVA SEAMONS AND ROY HILL, D.B.A. SEAMONS TRUCK LINES, AND JOSEPH J. MILNE TRUCK LINE, INC., A CORPORATION,

Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, A CORPORATION,

Respondent.

ANSWER OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Respondent, Wycoff Company, Incorporated, prays that the petition for writ of certiorari be denied and the judgment of the United States Court of Appeals for the Tenth Circuit, and the judgment denying petition for rehearing therein, be thereby affirmed.

Question Presented.

The question presented by petitioners, confines the issue to the narrow scope to which the District Court, below, sought to limit consideration and, therefore, should be amended to read:

When distributors of motion pictures ship prints thereof from California and New York via their branch exchange offices in Utah for showing by exhibitors of motion pictures in the area of several states served by such branch exchanges, under contracts between such distributors and exhibitors providing for exhibition under limited copyright, is the transportation between such exchanges in Utah and exhibitors in Utah in interstate commerce?

Statement.

To correct certain inaccuracies and omissions in the "Statement" of the petition, pages 3-6, it is deemed necessary to set forth the following:

The Court of Appeals, below, in its original opinion (R. 89-90) interpreted the facts of this case in a different manner than they are presented in the present petition (R. 3-6).

Petitioner, here, then petitioned that Court for rehearing (R. 93-128).

In denying rehearing, the Court of Appeals, below, in its supplemental opinion (R. 129) said:

> "An opinion speaks for itself and the fact that it may be misconstrued does not ordinarily require an opinion in support of an order denying a petition for rehearing, but in this case we feel that a statement is warranted, not only because we feel that the basis of the opinion is misconstrued, but also because *the petition for rehearing in setting out evidence, which it is claimed we ignored, perhaps inadvertently omits a part of the testimony of some witnesses which is essential to place such testimony in proper focus.*" (Emphasis supplied R. 129.)

Petitioner, in seeking the jurisdiction of your Court, nevertheless, persists in substantially the same interpretation of the facts, as in its prior presentation to the Court of Appeals, below.

The jurisdiction of your Court is sought to give the defeated party in the Court of Appeals, below, another hearing.

Magnum Import Company v. Coty, 262 U. S. 156.

As will be later developed, under the facts of this case, the opinions of the Court of Appeals, of the Tenth Circuit, are in harmony with the decisions of the Courts of the other circuits and with the decisions of your Court, and no question of public interest within the scope of this Record, is involved.

It is therefore, deemed desirable to further indicate the error of the petition, in its "appreciation" of tne factual issue.

Respondent, Wycoff Company, Inc., a corporation is engaged in the transportation of motion picture film including newsreels between motion picture exchanges at Salt Lake City, Utah, and exhibitors of motion pictures at various points in Utah, under authority of a certificate of public convenience and necessity issued by the Interstate Commerce Commission. This certificate authorizes such transportation between the Salt Lake City exchanges and points not only in Utah but as well in the States of Idaho and Montana (R. 1). Petitioner, Public Service Commission of Utah, issued Respondent an "Interstate License" to transport under the authority of the certificate issued by the Interstate Commerce Commission, within the State of Utah (R. 2).

Petitioner, in answer to these facts averred in the complaint, in the District Court, below, admitted that the transportation of newsreels between points in Utah is in interstate commerce (R. 3). The answer takes exception to these facts only to the extent that they infer that the transportation of motion picture film, other than newsreels, within the State of Utah, is interstate in character, or that the "Interstate License" issued by it, declared that the

transportation of motion picture film within the State of Utah is in interstate commerce or interstate in character (R. 3-4).

Further facts admitted by the reply of Petitioner to the request for admission of facts by Respondent in the District Court, below, are as follows:

The transportation of newsreels is interstate in character and has been so adjudged by the Interstate Commerce Commission. The Public Service Commission of Utah has threatened to and is attempting to stop Appellant from transporting all motion picture films, including newsreels, between points in the State of Utah (R. 24). Newsreels are customarily produced, processed, manufactured and packaged outside of the State of Utah, and are shipped from out-state points into the State of Utah for the purpose of being exhibited in theatres in Utah and the surrounding states. These newsreels are customarily booked under an agreement whereby the theatres in Utah and the other states contract in advance to receive and exhibit the newsreels prior to actual delivery in the State of Utah. It is customary for exhibiting theatres to show not only a newsreel, but also other films designated as a feature, comedy and other short subjects, all of which are distributed by different national film companies having branch offices in Salt Lake City, Utah. The distributors have principal offices in New York and California, and maintain branch offices in Salt Lake City from which they distribute the various types of motion pictures throughout Utah and the surrounding states (R. 5, 8).

In addition to the newsreels, the other motion picture films are likewise processed, manufactured and packaged outside the State of Utah for shipment to the State of Utah (R. 6, 8). These film distributors do not sell newsreels, features nor comedy films, but only license the right to exhibit them, and the ownership remains in the film distributors (R. 8, 9). The local distributing office in Utah is merely a branch office of the non-resident film company

(R. 11). The branch offices so maintained by some twelve national distributors (R. 5, 6) distribute the film not only in the State of Utah, but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada (R. 14).

With the above facts admitted by agreement, the factual issue is narrowed to the following:

Is the other motion picture film (features, comedies and short subjects) interstate in character in the same manner as admitted for newsreels?

To determine the answer to this question, it is necessary to review the entire picture of the transaction in order to determine the essential nature of the commerce.

Witnesses from five national distributors testified and showed the practice to be as follows:

Salesmen from the branch exchange offices of the distributors in Salt Lake City solicit applications from exhibitors, in the territory of the states served by these exchanges, to be licensed to exhibit the motion picture described therein. These applications which are in the form of a standard contract, are then sent by the exchange to the main office of the distributor, generally in New York, for approval or rejection. The contract for such licensed showing by the exhibitor does not become effective until approved and accepted by the home office. (R. 28-30, 40, 49, 56, 58, 59, and Exhibits of agreements following R. 76.)

These agreements designate the theatre and its location and describe the pictures licensed to be there shown, the conditions and limitations under which the distributor permits the exhibitor to have them for showing, the time the exhibitor may retain them for showing, provide the means by which the exhibitor may obtain the prints from the distributor and return them to the distributor. (See contracts following R. 76.)

Exhibit No. 1 (following R. 76) is a standard form of Republic Pictures (R. 58). The first paragraph of this agreement specifically provides:

"LICENSE—FIRST: The *Distributor grants the Exhibitor,* and the Exhibitor accepts, *a limited license under the respective copyrights* of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, *to exhibit* publicly *said motion pictures* and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm. film, *at the said threatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates therein provided for only, and for no other use or purpose;* provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and high quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theaters unless otherwise in the Schedule specifically provided. (Emphasis supplied.)

"TERM AND WARRANTY—SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be excluded, as provided in Clauses FOURTEENTH AND FIFTEENTH hereunder."

The fourth paragraph of the agreement requires that the exhibitor shall pay the distributor for any part of the print lost, stolen, destroyed or injured, while in the hands of the exhibitor, and with the distinct condition that, "Such

payment, however, shall not transfer title to or in any such positive print to the exhibitor."

Clearly the obligation of the distributor, therefore, is to service the exhibitor with a print to permit the showing under the limited license under copyright of the picture specified by the agreement. The prints are not sold but remain at all times the property and under control of distributor.

The print during the period it is in the exchange area, remains the property of the distributor and under its full control. The agreement provides for return by exhibitor to distributor when it has served its "limited license under copyright." Full discretion as to maintenance of the prints remains in distributor, which can require the print to be returned for inspection of "circuited" to another exhibitor in the same or another state (R. 36-37) or to another exchange area (R. 31, 32, 61).

The absolute control which distributor maintains, at all times, over the film, is made clear by the testimony of witness Elliott S. Windward of RKO Pictures, Inc., referred to in the supplemental opinion of the Court of Appeals (R. 129), which is as follows:

> "Q. Can you state whether or not your office exerts any control over what shipper (carrier) will be employed? Must certain requirements be met by carriers for you to release films to it?
>
> "A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.
>
> "Q. The home office requires approval?
>
> "A. Yes."
>
> * * *
>
> "Q. After the theater which has the motion picture film is through with it and is going to circuit it to the next theater, who has the determination where the next showing will be made of that film?

"A. The distributor. We do that.

"Q. You do that?

"A. We do that.

"THE COURT: That is the booking?

"A. That is the booking problem.

"THE COURT: You have all these pictures booked around a circuit. Your bookings determine. I think that would be obvious.

"Q. (By Mr. Durham) Directing your attention to bookings, who determines as between the exhibitor, your office and the New York office in what order bookings will be made?

"THE COURT: He has already explained that. The theater exhibitor requests the film on a certain date, so he starts the thing going, and then if Mr. Windward's office cannot supply the print he advises them and says: don't you want another picture on that date, or do you prefer a different booking date. He has testified to that already.

"Q. No booking is made until a contract has been entered into?

"A. No.

"Q. And no contracts are made except upon approval of your New York office?

"A. That is right."

The issue is still further narrowed by the admission of petitioner, that the transportation of "newsreels" between points in the State of Utah is in interstate commerce and interstate in character and denying that "short subjects" and "feature film" is not interstate in character or moving in interstate commerce when transported by respondent between the exchanges and the exhibitors in Utah.

"Newsreels"—The answer of defendant (R. 3) admits the allegation of the complaint (R. 1) that the transportation of newsreels between Salt Lake City, Utah, and points

in Utah is in pursuance of the Certificate of Public Convenience and Necessity issued to Respondent by the Interstate Commerce Commission. Agreements for the licensing of the showing of newsreels are for an issue covering a year for a showing on 104 or 52 specified days of each week at the exhibition point specified in the agreement. These agreements are concluded "before the news has happened" and necessarily before the prints have been produced (R. 65). A chart of locations of newsreels is kept (R. 48).

"Short Subjects"—Agreements for licensing short subjects are also written in series for showing on specified day of each week. The agreement could cover 3 or 4 different series of "shorts" or it could be confined to one series such as a cartoon series. In the greater number of cases, the agreement is concluded prior to the actual shipment from the laboratory. The contract is on the basis of a year. Necessarily, also, they are produced after the agreements are entered into (R. 29, 65).

"Features"—Sixty percent of the licensing of Feature Pictures is contracted for prior to the receipt of the prints (R. 40). Some features are also contracted for before they are produced and for showing on certain days of the week (R. 56-57). The principal difference between feature pictures and newsreels and shorts is that the exact date of showing at a particular exhibition point may not be determined until after the prints have been received by the exchange (R. 28, 60), although in some instances a specific date is fixed (R. 51). The agreement (Exhibit 1) fifth paragraph, specifies, "Unless otherwise agreed upon or unless definitely specified or otherwise provided for in the Schedule, the exhibition date or dates of each of said motion pictures shall be determined" as therein provided. In general practice a schedule of bookings is worked out between the exhibitor and the exchange and submitted to the home office for approval (R. 51).

The prints are shipped from the laboratories of the national distributors in New York, New Jersey and Cali-

fornia to the Salt Lake exchanges (R. 88, 46, 55), and thereafter the prints are delivered to the theatres and on the dates in accordance with this schedule of booking. The number of prints sent into the exchange, for each picture, is determined by the main office based upon its prior experience with respect to the need (R. 35, 58). The points to which the prints are shipped is governed by these bookings (R. 36-37). The main office is sent a copy of the daily shipping receipts of each print (R. 61). Under rules and regulations of the main office the exchange exercises discretion as to whether the prints shall be returned directly to the exchange for inspection, circuited to another theatre, or to another exchange (R. 31, 32, 61). When the print has served its purpose of being distributed to permit its licensed showing by the exhibitors it is sent out of the territory to such point as is directed by the main office for junking or other purpose (R. 31, 32, 54, 55, 65).

The Court of Appeals, below, in its supplemental opinion (R. 132) fully appraises the distinguishing and controlling nature of these facts:

> "The record is devoid of any evidence showing that the distributors accumulate a stock pile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you would do when you go to a retail merchandising store."

This finding is supported by and is in complete harmony under precisely similar facts, with *Kappler v. Republic Pictures Corp.*, 59 F. Supp. 112 (1945), which was affirmed by the Circuit Court of Appeals in 151 F. 2d 543 (1945), and by the Supreme Court per curiam 327 U. S. 757 (1945) rehearing denied, 327 U. S. 817 (1945). In that case, the District Court found that the distribution of film generally from the Exchange at Des Moines to other points in Iowa was part of the interstate movement from New York to the Exchange:

"The trouble with this contention is that it assumes that the films came to rest in Iowa. The defendant in this regard relies upon that class of cases where goods are purchased and shipped to a person in the state for resale and the shipment terminates before the resale is made. Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 460.

"The defendant overlooks, however, the fact that the shipments from New York and New Jersey to Iowa were made by the corporation to its branch office and were not completed transactions to a third party. • • •

"Under this situation, the goods did not come to rest in Iowa, but the interstate character of the transportation continued until the goods were in the hands of exhibitors, and even then they only stopped temporarily as the goods were licensed and not sold, and the transportation continued until after all the exhibitors had used them when they were returned to Des Moines and probably back to New York City."

The Circuit Court of Appeals, 151 F. 2d 543, 545, in affirming the above decision of the District Court, said:

"Defendant was not shipping the films to Des Moines to be stored nor for final delivery, but its business depended upon these films being kept in circulation. Plaintiff was an active factor in keeping the films in such circulation and use. We think it clear that the transportation of the films and their use must be viewed as a continuity, embracing shipments from New York and New Jersey to Des Moines, Iowa, and the shipment of them to and from Des Moines to other points of Iowa and other states."

Reasons for Denying the Writ.

To correct certain inaccuracies and omissions in the "Reasons for Granting the Writ", of the petition, it is deemed necessary to make the following statement.

1. Under this number, pages 8-9, the petition makes certain assumptions in an apparent effort to appeal for jurisdiction on the pretext that there is here resolved a question of importance which is in the public interest. These presumptions are unsupported by any fact and are entirely beyond the scope of this record.

This case is limited in its effect to the transportation of the specific commodity of motion picture film under the special circumstances in which such film is distributed and under the facts and circumstances of record.

The presumptions are contrary to law:

a. It was never conceived that a sovereign state had any regulatory jurisdiction over interstate commerce, other than legitimate police powers. In amending the Interstate Commerce Act by the addition of Part II (49 U. S. C. Section 303), the Congress defined interstate commerce as including that:

> "between places in the same state through another state; whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

b. The Interstate Commerce Commission from the inception of this amendment has found that the service of distributing film by motor carrier is a highly specialized one and has granted authority for service between points in film distribution areas without regard to state lines, *Film Transit, Inc., Extension of Operations*, 46 M. C. C. 1052 and *Transway, Inc., Common Carrier Application* 46 M. C. C. 1185; and newsreels between points in *Louisiana, Transway, Inc. v. Exhibitors Delivery Service, Inc.*, 51 M. C. C. 263.

c. The authority which respondent seeks to exercise, and as sustained by the Court of Appeals, below, is under a certificate issued by the Interstate Commerce Commission authorizing the transportation of motion picture film

over designated routes from Salt Lake City, Utah, to designated points in other states, with the right to serve the intermediate points in the State of Utah. Petitioner, Utah Public Service Commission, issued respondent a permit to operate under this authority between points in the State of Utah.

d. The Courts in rail rate cases and in motor carrier cases have consistently held that the transportation between the points in one state is in interstate commerce and under the jurisdiction of the federal government, and not the state government, where it is a continuing movement in interstate commerce.

2. The some twenty decisions cited under this number (2), pages 10-13, and under "Statement", pages 6-8, of the petition, completely fail to sustain the principal contention of petitioners that the decision of the Circuit Court of Appeals, Tenth Circuit, "is contrary to and in irreconcilable conflict with" the statement of the law by your Court and the Courts of other circuits.

This becomes entirely clear from a summary of these cited decisions, which fall under the following headings:

a. *Regulation:* All of the decisions are determined on the basis of facts as found in each case, just as the Court of Appeals, below, did in the instant case, in conformity with the finding of Justice McReynolds, in the cited case of *Public Utilities Commission v. Landon,* 249 U. S. 236 (1819) at 245:

> *"Interstate Commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."* (Emphasis supplied.)

Controlling facts in the cited cases are, for example, where sold by consignee after arrival at designated destina-

tion, *A. C. L. R. R. v. Commission of Georgia*, 281 Fed. 321; *Chicago, Milwaukee & St. Paul R. R. v. Iowa*, 233 U. S. 334; delivery of oil into storage tanks for sale, *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257 (cited Court of Appeals, below, R. 89, with *U. S. v. Erie R. Co.*, 280 U. S. 98) and *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 12 F. (2d) 541; delivery upon surrender of order B/L to warehouse of consignee, *Boyd v. U. S.*, 275 Fed. 16;

b. *Statutory Construction:*

(1) State Tax Laws: Selected out of mass of goods in warehouse, *American Steel & Wire Co. v. Speed*, 192 U. S. 500; held for sale *Brown v. Houston*, 114 U. S. 622; *Pittsburgh Southern Coal Co. v. Bates*, 156 U. S. 577; awaiting sale at destination, *General Oil Company v. Crain*, 209 U. S. 211; in state and not committed to transportation beyond, *Coe v. Errol*, 116 U. S. 517; chain store tax, *Liggett v. Lee*, 288 U. S. 517.

(2) Clayton Act: Gasoline brought into state for retail sale:

> "We do not think the Supreme Court has gone so far as to hold that, to meet the anticipated demand of customers without a specific contract therefor, interstate commerce continues until the demand eventuates in the form of an order or contract and the merchandise is delivered to the retailer." *Lipson v. Socony Vacuum Corp.*, 87 F. (2d) 265, 267.

(3) Interstate Commerce Act: Railroad wholly within state refused to accept shipments except on own B/L, held not within purview of Interstate Commerce Act, as written, *I. C. C. v. B. Z. & C. R. R.*, 77 Fed. 942, *U. S. & I. C. C. v. Chicago K. & S. R. Co.*, 81 Fed. 783; but contra when participating in through B/L and rates, *Boyd v. U. S.*, 275 Fed. 16.

The facts in the above cases cited in the petition are clearly distinguishable from the facts in the instant case.

Petitioner avoids rulings of its cited cases directly supporting the opinions of the Court of Appeals, below. For example, the quotation from the opinion in *B. & O. v. Settle*, 260 U. S. 166 at page 173, as set forth at page 11 of the petition, is extracted without reference to the last sentence of the paragraph from which it is taken, which reads:

> "The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by *the original and persisting intention of the shipper which was carried out.*"

The emphasis above supplied gives full support to the Circuit Court of Appeals, below, in its conclusion in the instant case.

This omitted quotation likewise brings *Atlantic Coast Line R. Co. v. Standard Oil Co.*, cited page 11 and quoted page 12 of the petition into proper perspective. The facts in that cited case are clearly distinguished by the expression of the Court at page 542, as follows:

> "It is apparent from the nature of the business that it is not known at any given time to what destination a particular quantity of these products will ultimately go. It is not until after an order is received at Wilmington that the destination of a particular shipment can be determined. The manager of the Wilmington plant states: 'I know when I receive this oil (at Wilmington). I hold it in the warehouse and the tanks until I receive orders to ship it out'."

In the instant case the destination is known. The film is shipped to go beyond the exchange to the exhibitors to carry out the obligation of the pre-existing contract to provide such print for showing.

In the cited case of *Atlantic Coast Line R. Co. v. Standard Oil,* 275 U. S. 257, 267, Justice Taft, enunciated these principles:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."

And at pages 268, 269, said:

> "These cases are illustrations to show that the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it."

The cited case of *B. & O. v. Settle,* 260 U. S. 166, gives support to the opinion of the Court of Appeals, below, in the statement pages 170-171:

> "And whether the interstate or the intrastate tariff is applicable depends upon the *essential character of the movement.* That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498; Ohio Railroad Commission v. Worthington, 225 U. S. 101; Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111; Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336. And in Baer Brothers Mercantile Co. v. Denver & Rio Grande R. R. Co., 233 U. S. 479, 490, this Court held that a carrier cannot, by separating the rate into its component parts, charging local rates and issuing local way bills, convert an interstate shipment into intrastate transportation, and thereby deprive a shipper of

the benefit of an appropriate rate for a through interstate movement.

"If the *intention* with which the shipment was made had been actually in issue, the fact that possession of the cars was taken by the shipper at Oakley and that they were not rebilled for several days, would have justified the jury in finding that it was originally the *intention* to end the movement at Oakley and that the rebilling to Madisonville was an afterthought. But the defendant Clephane admitted at the trial that it was *intended* from the beginning that the cars should go to Madisonville; and this fact was assumed in the instructions complained of. In other words, Madisonville was at all times the destination of the cars, Oakley was to be merely an intermediate stopping place; and the *original intention* persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, *the intention as it was carried out determined*, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the *intention* with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been *intended*, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs

apply. See Atchison, Topeka & Santa Fe Ry. Co. v. Harold, 241 U. S. 371; St. Louis Southwestern Ry Co. v. United States, 245 U. S. 136; Central Railroad Co. of New Jersey v. United States, 257 U. S. 247, Compare Philadelphia & Reading Ry. Co. v. Hancock, 253 U. S. 284."

And at page 172:

"The sole question, therefore, which could arise in this case was whether the movement actually entered upon at point of origin, and persisted in, was transportation of the lumber to Madisonville."

And at page 173:

"The distinction is clear between cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the original and *persisting intention* of the shipper which was carried out."

(Extended quotation and emphasis supplied to rebut persistence in petition, pages 10, 11, that Court of Appeals, below, erred in considering "intention".)

Particularly pertinent is the cited case of *Chicago, Milwaukee & St. Paul R. R. v. Iowa,* 233 U. S. 334:

"The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport."

Cited is *Southern Pacific Co. v. Arizona,* 249 U. S. 472, 477:

"Whether a shipment was at a given time in interstate commerce is a question of fact, Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 108."

U. S. v. Erie R. Co., 280 U. S. 98, 101, 102, is cited but the pertinent finding therein not shown in the petition is as follows:

> "But the nature of the shipment did not depend upon the question when or to whom title passes, P.R.R. v. Clark Coal Co., 238 U. S. 456, 465-6. It is determined by the essential nature of the commerce. B. & O. S. W. R. v. Settle, 260 U. S. 166, 170. It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate, Ohio R. R. Comm. v. Worthington, 225 U. S. 101, 108-110; Texas and New Orleans R. Co. v. Sabine Tram Co., 227 U. S. 111, Hughes Bros. Co. v. Minnesota, 272 U. S. 469; or by the fact that there may be a detention before or after shipment on the local bill of lading, Carson Petroleum Co. v. Vial, 279 U. S. 95. The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing *intent* that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain them. Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268; Virginian R. Co. v. United States, 272 U. S. 658."

The petition, page 14, seeks to avoid the controlling effect of *Beggs v. Kroeger Co.*, 167 F. (2d) 700, by saying "the goods remained only long enough to pick them up and haul them to the chain stores." The case shows no such limiting fact. The Court said:

> "Practically all of the goods the defendant transported to its retail stores in Arkansas were processed, manufactured or processed outside the state for the specific purpose of being moved to the retail stores for sale. That part of the goods which went through the warehouse did not 'come to rest' in the warehouse. The

warehouse was merely a convenient instrumentality for the division of the shipments coming to it, and the continuation of the movement of each part to the retail stores. The facts in this case distinguish it from cases such as Atlantic Coast Line Ry. Co. v. Standard Oil of Ky., 275 U. S. 257. Here, the defendant knew when the shipments began out state that all of them were destined to the retail stores. The warehouse was not a wholesale establishment, and none of the goods that entered it were resold."

Precisely the facts in the instant case applying to the distributors of film. The Court of Appeals, below, properly found the controlling facts, in the case here for consideration, in its supplemental opinion, R. 132, as follows:

"The record is devoid of any evidence showing that the distributors accumulate a stockpile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you do when you go to a retail merchandising store.

"We adhere to our conclusion that the record makes it clear that the contracts between all the exhibitors and a distributor contemplate a continuing movement of a film from the distributor through the exchange to all of the exhibitors and from the last exhibitor back to the distributor from whence it came, interrupted only temporarily at the exchange for purposes of mutual benefit to all the parties."

These conclusions are in full harmony with the law of the cases cited by the petition.

The decisions of the Court of Appeals, Tenth Circuit, are based upon a proper finding and appreciation of the facts, and supported by the prevailing law. No sound basis of error has been established by the petition.

Conclusion.

No recognized basis for assumption of jurisdiction is shown by the petition.

Therefore, the petition for certiorari should be dismissed.

Respectfully submitted,

WAYNE C. DURHAM,
Suite 3, Utah Building,
351 South State Street,
Salt Lake City 1, Utah.
HAROLD S. SHERTZ,
226 S. Fifteenth Street,
Philadelphia 2, Penna.,
Attorneys for Respondent.

Of Counsel:

KING, ANDERSON & DURHAM,
and
SHERTZ, BARNES & SHERTZ.

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HAROLD B. WILLEY, Clerk

No. 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON AND W. R. McENTIRE,

and

MELVA SEAMONS AND ROY HILL, d.b.a. Seamons Truck Line, and JOSEPH J. MILNE TRUCK LINE, INC., a corporation,
Petitioners,

v.

WYCOFF COMPANY, INCORPORATED, a corporation, *Respondent.*

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE.

JOHN P. RANDOLPH,
AUSTIN L. ROBERTS, JR.,
Attorneys for said Association.

7413 New Post Office Building
Washington 25, D. C.

November 3, 1952

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 83-86) is reported at 195 F. 2d 252 (C.C.A. 10); the supplemental opinion of the Court of Appeals (R. 114-117) is reported at 195 F. 2d 255 (C.C.A. 10).

PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners is a voluntary association, the membership of which embraces the members of the Public Utility Regulatory Commissions and Boards of all the 48 States of the United States, the District of Columbia and the Territories of Puerto Rico and Hawaii.

By the Constitution of the Association either the President or the Executive Committee of the Association is empowered to direct the General Solicitor to appear on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which, in the judgment of the President or Committee, appearance on behalf of the Association should be made. This brief is filed on behalf of the Association by direction of both the President and the Executive Committee in the general public interest.

Briefs of this nature over the years have been filed in cases wherein a general principle applicable to regulation by the states is involved. Often such briefs have been directed to the question of state regulatory jurisdiction as opposed to federal regulatory jurisdiction. This brief will be directed to that one issue of jurisdiction in this case.

STATEMENT OF THE CASE

The case is to review a decision of the United States Court of Appeals for the Tenth Circiut reversing a judgment of the United States District Court in Utah denying an injunction against the Utah Public Service Commission and refusing to declare the transportation of motion picture films between points within the State of Utah to be interstate commerce.

We will not burden the court with a detailed statement of the facts with reference to the record pages since the facts are fully stated with record references in the brief

filed by petitioners. For the purposes of this brief the ultimate and controlling facts briefly stated are these:

The Public Service Commission of the State of Utah sought to take jurisdiction over the operations of a motor carrier employed by certain motion picture exhibitors to transport motion picture films between the place of business of a film distributor located in Salt Lake City and the theaters of the exhibitors located in the State of Utah and also between these theaters all within the state. The motor carrier involved sought an injunction in the District Court as above mentioned. The motion picture films involved were made either in New York State, New Jersey State or the State of California and are shipped from these states, rolled in lengths of 1,000 feet, with a number of rolls packed in cardboard cartons, consigned to and delivered to the distributor in Salt Lake City. The distributor after receiving the cartons, breaks the packages and processes the films. The processing consists of splicing two 1,000 foot lengths of film then adding to this 2,000 foot length of film, what is known in the industry as, a head and tail, so that the film can be used in the projection machines of the exhibitors. This 2,000 foot length of film, with the head and tail attached, is then wound on a metal reel and fits in a projection machine. The film thus processed and made ready for exhibition is then placed in a metal container and stored in a vault on the distributor's premises until such time as it is to be transported to the theater of an exhibitor. As pointed out, in the opinion below, each exhibitor does have a contract with the producers of the films whereby they are given the right to exhibit films made by each producer. The contract does not specify what films an exhibitor is to receive. The exhibitor goes to the distributor in Salt Lake City where the films that the distributor has received and processed are shown to the exhibitor at a pre-view. After seeing the films the exhibitor selects those that he desires to exhibit in his theater and by agreement between the distributor and the exhibitor the

films to be exhibited in the theater are selected and dates assigned for the exhibition. In accordance with this agreement the distributor delivers the processed films in the metal containers to a motor-carrier designated by, and paid for his services by the exhibitor and this motor carrier then transports the films from the place of business of the distributor to the theater of the exhibitor, all within the State of Utah.

THE QUESTION PRESENTED

The question presented is whether a motor carrier engaged in transporting motion picture films between points within a single state is properly subject to regulation by the state regulatory commission under the provisions of existing state laws or whether the operation is such as to be regulated exclusively by Federal authority.

SUMMARY OF ARGUMENT

This brief being directed to the one issue of jurisdiction (state versus federal) must necessarily in seeking the answer to this question of jurisdiction deal with the following question of law: Is the transportation involved intrastate commerce or interstate commerce?

Upon the whole record in this case the transportation of motion picture film from the local distributor in Salt Lake City, Utah, to theaters in the State of Utah and between theaters in the State of Utah and then back to the distributor is not interstate commerce. The films produced out of the State are consigned to and shipped to the distributor in Salt Lake City. The distributor then processes the films and makes them ready for use in the projection machines of the exhibitors. The transportation from distributor to exhibitor is arranged by and paid for by the exhibitor after the exhibitor has selected the film he wishes to exhibit at the distributor's preview and the dates for exhibition have been agreed upon between the distributor and the exhibi-

tor. These facts bring the case squarely within the "broken package" doctrine—the point of termination of the interstate commerce principle. Interstate commerce ceased when the distributor received the films. *Higgins* v. *Carr Brothers Company*, 317 U. S. 572; *Atlantic Coast Line Railroad Company* v. *Standard Oil Co.*, 275 U. S. 257.

Such transportation of a purely local nature, contracted for and carried out wholly within the borders of the State of Utah is not interstate commerce within the definition thereof contained in Part II of the Interstate Commerce Act, Sec. 203(10); U. S. Code, Title 49, Sec. 303(10).

ARGUMENT

The opinion below places great emphasis upon the license contract between the exhibitor (theater owner) and the producer of the motion picture films as the controlling factor in determining whether or not the transportation involved is intrastate or interstate commerce. It appears that the Court below fell into error by failing to give consideration to the essential nature of the transportation involved and by failing to give consideration to the "broken package" doctrine and to the purely local nature of the transpotration.

The supplemental opinion below is further evidence that the Court erred in these respects because that opinion is largely a quotation from some of the evidence in the record which shows plainly that the Court was largely looking at the above-mentioned contract and the over-all method by which motion pictures are produced and exhibited throughout the nation, and not at the essential nature of the local transportation involved.

Neither of the opinions below take into consideration these facts—that the transportation of the motion picture films involved, by the Wycoff Company, between the local distributor in Salt Lake City and the exhibitors in the State of Utah, was contracted for and paid for by the local distributors after the films had come to rest at the place of

business of the distributor, and there had been processed and made ready for exhibition and a particular film selected for exhibition, and a time for exhibition had been agreed upon between the exhibitor and the distributor. The license contract between the exhibitor and the producer of the films does not attempt in any way to control these subsequent agreements whereby the local transportation of the films is brought about. The exhibitor determines the method of transportation and pays for the transportation from the time the processed films leave the distributor's premises until the films are returned to the distributor.

The only thing that the out-of-state producers have to do with this transportation is to approve the carriers. It is readily understandable why the producers of the films require that the carrier be approved, because the title to the films remains in the producer. Both the distributor and the exhibitors are in the nature of lessees of the films. Therefore the producer has an interest in the safety and reliability of the local transportation of its property. This interest and requirement does not change the fact that the transportation involved is wholly local in character and is contracted for and carried out after the films have come to rest with the local distributor and after the original packages consigned to the distributor have been broken open and the films have been processed and re-packaged and made ready for exhibition.

These facts bring the case clearly within the "broken package" doctrine as announced by the following decisions of this court—neither of which has been overruled or criticized: *Higgins* v. *Carr Brothers Company*, 317 U. S. 572; *Atlantic Coast Line Railroad Company* v. *Standard Oil Co.*, 275 U. S. 257.

It is true that the licensing contract contemplates that the films after being processed by the distributor will be transported to the exhibitor, but such does not make the contract the controlling factor in determining whether or

not the transportation between the distributor and the exhibitor and between the theaters of exhibitors and then back to the distributor is transportation in interstate commerce. The method of transportation, the carrier, the time when the transportation will take place, and the person who will pay for the transportation are all determined by agreements between the exhibitors and the distributor which agreements are made after the films are received by the distributor as consignee thereof, the original package broken up, the film processed and re-packaged for exhibition. The transportation of the films within the State of Utah under the aforesaid circumstances is a result of such agreements as aforesaid. These agreements that determine the method, etc., of transportation are between local business people and are concerned with local matters only. While previous transportation in interstate commerce from the out-of-state producers to the Salt Lake City distributor made the local transportation possible, nevertheless the interstate journey ceased when the package of films were delivered to the distributor after which the agreements for local transportation were made and the local transportation carried out. This is a common occurrence in the field of commerce where goods are manufactured in one state, shipped to dealers in another state and through these dealers eventually are sold to the consuming public. After the local dealer once receives the goods, breaks up the packages and distributes to consumers the transactions therein concerned become intrastate commerce, even though it was contemplated at the time the goods were shipped by the manufacturer that they would eventually arrive in the hands of consumers by some means of local transportation.

The error of the opinion below lies in the fact that it fails to distinguish between the local transportation in Utah, which is herein involved, and the over-all transactions by which motion picture films are produced and exhibited through the United States. When the facts concerning the

local transpotration involved in this case are looked at separate and apart from the over-all methods employed in the production, distribution and exhibition of motion picture films then the local nature of the transportation in Utah and the fact that it has become intrastate commerce can be more readily understood. The local transportation involved here is merely incidental to the interstate journey of the picture films from the producers to the local distributor. *United States* v. *Yellow Cab Company, et al.*, 332 U. S. 218.

We respectfully urge that the decision below should be reversed.

Respectfully submitted,

JOHN P. RANDOLPH,
AUSTIN L. ROBERTS, JR.,
Attorneys for
National Association of Railroad and Utilties Commissioners, *Amicus Curiae*,
7413 New Post Office Building,
Washington 4, D. C.